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89-1788

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Claude C. Fletcher
Petitioner,

v.

San Jose Mercury News, Inc.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEALS SIXTH DISTRICT

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pro se

QUESTIONS PRESENTED FOR REVIEW

1. Whether highly unreasonable conduct constituting an extreme departure from ordinary standards of investigation and reporting is alone enough to establish the malice necessary to assess liability in a public-figure libel case.

2. Whether "literary license" excuses major factual departures from witness statements without limits in a defamation action instituted by a public official.

3. Whether the Appellate Court's opinion in this case is an appropriate illustration of the manner in which the Supreme Court has instructed appellate courts to review libel judgments regarding public officials, such as will serve as a model precedent without embellishment by this Court?

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SUPREME COURT OF THE UNITED STATES
October Term, 1990

No. _____

CLAUDE C. FLETCHER,
Petitioner,

v.

SAN JOSE MERCURY NEWS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEALS SIXTH DISTRICT

Petitioner, Claude C. Fletcher, respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeals, Sixth District entered in the above-entitled proceeding on November 9, 1989.

OPINION BELOW

The opinion of the California Court of Appeals, Sixth District is reported at 216 Cal.App.3d 172 and is included in the Appendix hereto.

JURISDICTION

The judgment of the California Court of Appeals, Sixth District was entered on November 9, 1989. A timely Petition for Rehearing was filed on November 21, 1989, and denied. A timely Petition For Review to the

California Supreme Court was filed on December 18, 1989, and denied by order dated February 1, 1990. This Petition for Writ of Certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, United States Constitution:
Congress shall make no law.....abridging the freedom of speech, or of the press.....

Seventh Amendment, United States Constitution:
In suits at common law, ...the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

A. Preliminary Statement

On June 30, 1986, a jury In San Jose, California awarded $250,000 in general damages, special damages of $25,000 and $735,000 in punitive damages in a libel action instituted by Plaintiff Claude C. Fletcher ("Fletcher"), a San Jose city councilman, against Defendant San Jose Mercury News, Inc. ("Mercury News"), a daily newspaper of general circulation and the dominant source of news in the area. CT 183-189, RT 2661-2666. On July 31, 1986, Defendants filed a motion for judgment notwithstanding the verdict and on August 11, 1986, they filed a motion for new trial. CT 196, CT 305. Although the trial court judge agreed with the jury that the newspaper articles were defamatory and false, on September 12, 1986, he granted both the j.n.o.v. and new trial motions. CT 407. The court specified its reasons in a 25-page memorandum filed on September 22, 1986 CT 408-432, which awarded costs to Defendants. CT 432-438. The California Court of Appeals Sixth District, while agreeing the articles contained

factual errors, affirmed the ruling on November 9, 1989. A Petition For Rehearing was filed on November 21, 1989 and denied. The California Supreme Court denied Plaintiff's Petition For Review on February 1, 1990. It should be noted that Plaintiff filed both a libel and slander cause of action. At close of Plaintiff's case during trial, defendants moved for nonsuit on both causes of action. The trial court denied the nonsuit motion as to the libel cause of action and granted it as to the slander cause of action. RT 1486-1487:10, CT 429:20-430:22.

The Court of Appeals' decision effects a significant reformulation of both the substantive and procedural safeguards of those who have been defamed as articulated by this Court in Harte-Hanks Communications, Inc. v. Connaughton 109 S.Ct. 2678 (1989). Certiorari should be granted in this case because, if left undisturbed, the Court of Appeals' decision could profoundly alter the scope of debate in this nation on public issues and candidates for public office.

B. Statement of Facts

1. Superior Court Proceedings

The Superior Court trial began on May 21, 1986 and continued for almost six weeks. The facts presented at trial may be summarized as follows:

a. The 1984 Election

Fletcher, a San Jose City Councilman announced his candidacy for reelection in early 1984. The filing deadline for the election was March 9, 1984 and he did not have an opponent as of March 4, 1984. 4 RTR 1052:13-14, 7 RT 1851:11-14. The Mercury News ran its first article on the front page of its Sunday, March 4, 1984 edition and shortly thereafter an opponent filed against Fletcher. CT 7, 4 RT 925:2-14. The "bribe" and "conflict of interest" allegations contained in the articles quickly became the major issue in the reelection campaign. Fletcher was unable to overcome the devastatingly negative image created by the newspaper articles and as a result was defeated in his reelection

campaign. 4 RT 1056:13-16, 8 RT 2214:1-20, 2244:12-19. He had emotional and physical problems as a result of the Mercury news articles. 4 RT 1056:27-1057:21, 1060:22-1061:6, 1063:2-1064:11-19. The Mercury News had previously opposed Fletcher both as a candidate and as a public official regarding many local issues. It was a common perception that the Mercury News, considered by many to be controlled by liberal Democrats, wanted an opponent against Fletcher, a conservative Republican, in the 1984 election because they had strong disagreements with him as an individual and on many issues.

b. The Procedural History

In early January 1983, Economic and Social Opportunities, Inc. ("ESO"), a local anti-poverty agency, had available from its State counterpart, Cal-Neva, a home insulation program for low-income people. Pltf's Exhibit 54. The ESO board, on which Fletcher sat as a member, refused to approve its staff proposal which anticipated expanding the existing in-house ESO insulation program. 3 RT 804:1-16. Fletcher and ESO executive director, Tommy Fulcher, ("Fulcher") strongly urged the board to approve the in-house method of handling the program. 3 RT 803:4-15, 6 RT 1510:9-20, 1570:19-26, 1571:20-1572:6, Deft's Exhibit 101. The board refused to do so because of the funds required to start the program. The board was on the verge of dropping the proposal altogether when it was suggested that the agency try and find a private contractor to perform the work, relieving ESO of any possible monetary loss on the program. 6 RT 1575:4-1576:19. Board members interested in that approach were to report back to the ESO board at its February 7 meeting on their findings. 3 RT 804:22-24.

Subsequently, Fletcher asked several insulation contractors, including Weathermaster Insulation Company of Fresno, California ("Weathermaster") to consider doing the work for ESO. 2 RT 507:5-15, 4 RT 955:3-11, 4 RT 969:9-13, 1093:14-24, 3 RT 806:17-25, At that time, Weathermaster had an extensive operation in the San Jose area with the Pacific Gas and Electric Company insulation program. 2 RT 505:20-506:12. Fletcher

had worked for Weathermaster some 20 years earlier and had remained friends with both the owner, Don Smith, and sales manager, Archie Westfall. 2 RT 503:18-28, 4 RT 945:10-946:26. ESO changed its February 7 board meeting date to February 9 and Fletcher had a scheduling conflict with the new date. 4 RT 973: 2-22. Since Fletcher would be unable to attend that meeting, the ESO board chairperson requested that Fletcher call board members prior to the meeting and tell them of his findings on the insulation program. 3 RT 807:7-18. He called some of the board members and told them a private contractor was willing to discuss handling the insulation contract and that approach seemed feasible for the program. 4 RT 973:23-974:4, 1118:23-1120:8. During the February ESO board meeting, Executive Director Fulcher urged the board to approve Weathermaster as contractor for the insulation program. Deft's Exhibit 103.

At the end of February, Archie Westfall contacted Fletcher and discussed the fact that Westfall was considering the purchase of Weathermaster from Don Smith. 2 RT 509:16-28, 3 RT 655:18-23, 4 RT 964:17-21. He suggested Fletcher consider investing start-up capital in the business venture. Fletcher was interested but refused to get involved before Don Smith and Westfall had resolved their problems. 2 RT 509:28-510:28. Fletcher purposely did not attend any further ESO meetings because of his interest in Weathermaster and resigned from the ESO board on March 9, 1983. 3 RT 885:28-887:9, 4 RT 976:10-977:6, 978:11-17, 3 RT 807:19-809:7, 4 RT 978:20-979:6.

Some of the ESO board felt very strongly that it should only deal with minority contractors and the ESO insulation program was given to a group of Hispanic contractors on March 28, 1983 and no part of that contract went to Weathermaster. 2 RT 527:24-28, 4 RT 992:25-993:3, 6 RT 1647:20-1649:8.

Shortly thereafter, Fletcher and Westfall formed a new corporation and took over the Weathermaster business. 3 RT 511:27-512:28, 539:-540, 4 RT 957:16-22, 959:19-960:2, Plt's Exhibit 25.

c. The Allegations

On July 4, 1983, Phil Trounstine, a reporter and editor for the Mercury News, was told by Joe Melino, an ESO board member who was strongly opposed to the insulation project, that Fletcher was involved in a conflict between his membership on the ESO board and the awarding of the ESO insulation contract. 5 RT 1185:25-1186:12. Trounstine took no action on the information from the time he received it on July 4, 1983 until late January of 1984. 5 RT 1188:22-1189:10, 1200:7-25, 1206:7-17. At that time, he turned the information over to Scott Herhold ("Herhold"), a Mercury News reporter. 5 RT 1189:23-1190:12, 1206:20-24, 7 RT 1930:1-10, 1932:15-1933:6.

In late January of 1984, Herhold interviewed Fulcher and was told that Fletcher had possibly offered Fulcher a bribe. 6 RT 1541:7-20. Fulcher also told Herhold that he didn't know what Fletcher meant by the alleged bribe statement ("There's something in this for you"); that he couldn't read plaintiff's mind; and that he didn't know whether Fletcher was talking about him personally or ESO. 6 RT 1613:17-1614:18, 7 RT 1974:6-21. This information never appeared in Herhold's articles in the Mercury News. CT 7-14. All that did appear in the articles was that Fulcher "interpreted" this and other statements about a trip to Hawaii "as a bribe." CT 7-9.

d. The District Attorney Investigation

In 1983, Fulcher went to the Santa Clara County District Attorney about the awarding of the ESO insulation contract. The District Attorney did an extensive and thorough investigation. 3 RT 716:21-24, 711:5-7 They interviewed approximately 12 people, examined documents, and conducted a taped undercover telephone conversation between Fletcher and Fulcher which was not allowed into evidence by the court. 3 RT 714:24-719:19, Pltf's Exhibit 52. The District Attorney concluded that there was no evidence of a violation of the conflict of interest laws by Councilman Fletcher. 3 RT 715:14-19. At all times, the District Attorney maintained the allegations in strictest confidence and very carefully avoided any publicity on this investigation.

Fletcher did not even know who had filed the complaint against him and the issue did not become public knowledge until the Mercury News became involved.

At the trial of this action, Tom Houston, former chairman of the California Fair Political Practices Commission, was asked, if plaintiff's conduct was in conformance with California conflict of interest law. He testified it was, 3 RT 867-871:27, and furthermore testified that with respect to the conflict of interest area, the written law and ethical standards were identical. 3 RT 874:16-26.

e. The Mercury News Investigation

Dissatisfied with the District Attorney's failure to indict Fletcher, the Mercury News decided to conduct its own independent investigation of the issue. 7 Rt 1934:13-22.

Reporter Herhold interviewed a large number of people in the San Jose area and several other cities in Northern California. His interview tactics were described as unfair and misleading by a Stanford journalism professor. 5 RT 1250-1276.

The Mercury News spent approximately two months trying to discredit Fletcher. It was this very investigation that established malice, they did not find the evidence they had hoped for so they made a deliberate choice to change the truth by fabricating their own statements for witnesses in an attempt to discredit Fletcher.

Had the Mercury News printed a story containing only the allegations that were not contrived it would have been bland and of little consequence to anybody.

f. The Mercury News Articles

The gist or "sting" of the articles the jury found as libelous was the Mercury News accusations that Fletcher had a financial interest in Weathermaster and tried to steer a $1.6 million dollar ESO contract to Weather-

master prior to his resignation date of March 9, 1983, and thus was guilty of a conflict of interest.

The evidence clearly showed that several portions of the articles were not only false but that the Mercury News knew they were false at the time of publication.

March 4, 1984 Article

This article attempted to portray Fletcher as a person trying to personally profit from his public office, it tried to reinforce that contention by stating that many of Fletcher's associates disagreed with his version of events and the timing of those events.

The article quoted Archie Westfall as saying, "The reason I wanted to come to San Jose was because of the low-income business," Westfall said. " When I met Claude, I set up the office, and then he became involved down the line."

Mr. Westfall emphatically testified that he did not make those statements. 2 RT 570:24-27.

The article reported that Leif Sethne "said Fletcher and Westfall came by his office in late February to discuss buying supplies and acquiring office space" and that he "said the conversation occurred well before he left with his wife for Hawaii on March 8, 1983." 7 RT 2028:3-2032:3, CT 8.

Mr. Sethne testified that he did not make those statements. 8 RT 2248:24-2250:13, 8 RT 2251:2-5. He also described Herhold's interview as "devious". 8 RT 2267:24.

The article reported that James O'Day "confirmed that Fletcher stopped by his offices in late February or very early March" and that Westfall "told him Fletcher was a 49 percent partner in Weathermaster." CT 8, 7 RT2023:5-11.

Mr. O'Day testified that he positively did not make those statements. 3 RT 678:5- 684:2. He further stated that Herhold "kept pushing the dates that he already had,

wanting me to agree with those.....it seemed like he was getting a little upset that I was not agreeing with him.....he was a little bit obnoxious." 3 RT 674:22-677:7. Herhold did not take any notes during the interview. 3 RT 679:5-7.

The article identified Jack Kiewit only as a leasing agent. It reported that he said "he showed Westfall and Fletcher around the office building in February or early March." CT 8

Mr. Kiewit testified that he did not make that statement. 3 RT 841:12-864:24. He described Herhold's interview as "slick" because he "kept trying to move me to say some things that weren't true." 3 RT 866:5-11.

During Herhold's interviews for this article he interviewed Don Fullerton. Mr. Fullerton was not quoted in the newspaper article, however, he testified that Herhold, "kept making inferences and statements" suggesting Fletcher was involved at the Weathermaster address earlier than what Mr. Fullerton remembered. "It was like a cross-examination for me. He tried to get me to answer that he was there the late part of February, early part of March by asking the question several different ways." 3 RT 877:14-22. "He was very insistent that I should recall that Mr. Fletcher was there in the latter part of February, early part of March." "He continued to go back to the fact that he thought that I should agree with him" . 3 RT 878:13-22. Mr. Fullerton also testified that Herhold indicated "we have to get people like this out of office." 3 RT 878:26-27

The article included the following statement: "Fletcher.....tried to steer a $1.6 million contract to a firm in which he became a partner, according to five officials of the agency," emphasis added. This statement was also repeated in each of the subsequent articles.

That statement was false as shown at 4 (d) on page 14 below.

March 6, 1984 Article

This article attempted to reinforce the Mercury News

allegation that "Fletcher's involvement with Weathermaster was substantially earlier than he acknowledged." It focused on the March 1, 1983 Weathermaster meeting and Herhold's interview with Donna Purcell and Kaye Vaine, then an employee of Tommy Fulcher at the ESO agency, who was willing to support the Mercury News allegations of Fletcher's involvement with Weathermaster before his resignation from the ESO board.

Herhold received the names of several other people from Vaine who could have been contacted to check the accuracy of Vaine and Purcell's memory of events. 6 RT 1725:12, 1745:10. Instead of doing that, he rushed the article into print the very next day. 6 RT 1726:17-21. The Mercury News had an audio tape of the March 1, 1983 Weathermaster meeting. The tape did not support any of the women's allegations about Fletcher's involvement with Weathermaster. 7 RT 1785:2-7. Furthermore, every witness that testified and had attended the March 1 meeting disagreed with Vaine and Purcell's version of that meeting.

It was clear that Vaine and Purcell were hostile to Fletcher, and this fact should have given rise to a duty to investigate further as opposed to merely rushing the story into print within 12 hours of learning of the saleswomen's version.

March 10, 1984 Article

This article also attempted to reinforce the Mercury News allegations about Fletcher's involvement with Weathermaster.

The article quoted David Van Nus as saying, "There's absolutely no doubt in my mind that Claude Fletcher was involved in Weathermaster before March 1." CT 12

Mr. Van Nus testified he did not make that statement. He repeatedly told Herhold that he had doubt in his mind that Fletcher was involved. 2 RT436:6-437:2. In fact, Herhold's own notes of the conversation indicated the exact opposite of what was printed in the newspaper. 8 RT 2139:14-24, 2133:23-2134:3.

The article also quoted David Van Nus as saying, "He said Fletcher missed some Tuesday night meetings because of his council sessions." CT 12.

Mr. Van Nus emphatically denied saying that and stated that he lived in Fresno and did not even know when the San Jose City Council met. 2 RT 438:15-24.

The article stated that Richard (Dutch) Van Nus said he had seen Fletcher at a Weathermaster meeting in Fresno "shortly after the first of the year." And that Fletcher was introduced at that meeting. CT 12.

Mr. Van Nus denied making those statements. 2 RT 466:9-467:8.

March 31, 1984 Article

The article stated that, "Two former salesmen.....have changed their accounts of Fletcher's involvement in the business last year." *This was false, the Van Nus brothers stated they had not made the quotes attributed to them. They had not "changed their accounts."*

This article also repeated fabricated statements previously attributed to Mr. Richard Van Nus and Mr. David Van Nus.

2. The Verdict

The jury received instructions on June 25 and 26, 1986, and retired for deliberations. CT 178-179. On June 30, 1986, the jury returned its verdict in favor of plaintiff on all issues. The verdict form asked the jury these questions: (1) Has the plaintiff proved by a preponderance of the evidence that the articles published by defendants had a defamatory meaning (as that term is defined in the instructions)? (2) Has the plaintiff proved by a preponderance of the evidence that the general substance of the defamatory articles published by defendants was false, meaning that the "gist" or "sting" of the articles was false? (3) Has the plaintiff proved by a preponderance of the evidence that the defamatory and false articles published by defendants were a proximate cause of damage to the plaintiff? (4) Has the plaintiff proved

by clear and convincing evidence that the defamatory, false and damaging articles published by defendants were published by a defendant with the knowledge that such articles were false, or were published with a reckless disregard of the truth, at the time of publication, and thus were unprivileged as to that defendant? CT 183-189. The jury answered all the questions affirmatively.

3. Trial Court Review

The trial of the issues in this case was a long, expensive, complex and difficult one for all concerned. Defendants madenumerous in limine motions which took days to argue and resolve. Moreover, the court painstakingly reviewed and personally researched many of the legal issues which were raised by the parties during the trial and did likewise in arriving at the jury instructions which were ultimately given.

Without being presumptious, it is respectfully submitted that it was not only a difficult case for the parties and their respective attorneys but also for the trial court.

The trial court's written ruling contained some unusual observations by the judge. One of the more interesting aspects of his ruling was the inclusion of a Mercury News editorial on which he had specifically ruled against use as evidence of an actionable libelous statement and was never seen by the jury. CT 418:21-419:9, 429:13-16, 433.

The trial court refused to allow plaintiffs' use of the District Attorney tape recording of a conversation between Fletcher and Fulcher that had a strong impact on credibility determinations of Mr. Fulcher. Pltf's Exhibit 52.

Also, the court refused to allow the testimony of Mr. Malcolm Misuraca, a Santa Rosa attorney, who had written a letter on August 18,1980 emphatically denying quotes attributed to him by then Mercury News reporter Phil Trounstine in a negative article on Fletcher.

During Voir Dire of the jury, one potential juror

stated that he could not rule against a media defendant regardless of the evidence. The trial court judge urged plaintiff's attorney to go on to other people. Only after intense discussions did the trial judge release that individual from the jury panel.

4. The Decision Below

The case load for this Appellate Court has been so burdensome that a new panel, composing a majority of this panel, was recently seated. It is not unlikely that some cases, especially one as voluminous and complicated as this one, could receive less than thorough independent review due to the pressing demand of so many other cases. This could explain why the Appellate Opinion contains several assertions of "fact" that are simply not reflected in the trial record and others that are directly contrary to undisputed record evidence. For example:

(a) The opinion states, "Trounstine asked Melino to contact Goda to see if Goda would be willing to talk to Trounstine about Fletcher. A few weeks later, Melino reported that Goda was unwilling to speak to Trounstine..." 216 Cal.App.3d 179.

Mr. Melino stated that he did not recall having done this. 8 RT 2080:12-16

(b) The opinion also states, "However, Weathermaster did receive a fraction of the ESO weatherization work." 216 Cal.App.3d 179, emphasis added.

This is plainly wrong. The entire contract was awarded to Hispanic contractors. 2 RT 527:3-28, 4 RT 992:25-993:3, 6 RT 1647:20-1649:8.

(c) The opinion states, "At trial, Sethne, O'Day and Jack Kiewit, the previously unnamed leasing agent, testified that they did not make the statements attributed to them in the March 4 story. The Van Nus brothers also stated that they were inaccurately quoted." 216 Cal.App.3d 182.

These fabricated statements seem to have been treated as almost inconsequential by the Appellate Court.

The court ignored Archie Westfall's denial of the quote attributed to him. 2 RT 570:24-27.

(d) The opinion states, "Herhold's key source, Fulcher, was accurately quoted, as were the allegations attributed to the other ESO board members." 216 Cal.App.3d 189, emphasis added.

The other board members were supposedly "lobbied hard by Fletcher in an attempt to steer the contract to Weathermaster." The following excerpts from trial testimony of those board members show the allegations as stated by the newspaper were false:

Jo Fields: "During the first phone call (with Herhold) we did discuss whether or not I felt I had been lobbied. Initially, I said I don't think so. 8 RT 2339:1-3 "...And I felt when I conceded, Yes, then I guess I have been lobbied. *Question* - After he explained that definition to you? *Answer* - After we both agreed that, that, yes, the definition is, lobbying is, lobbying is asking a question, whether it's in front of a larger group or to one person." 8 RT 2340:7-12. "I said I didn't find anything wrong, or maybe I said improper at the time, about the phone call, because he had indicated he would report back to the board." 8RT 2342:6-8.

YaYa DeLuna: *Question* - At any time did you tell the defendant Herhold that Claude Fletcher was trying to push Weathermaster on you? *Answer* - No. 4 RT 935:12-14.

Reppie Bautista: *Question* - Ms. Bautista, did you ever tell any ESO board member at any time that you had been lobbied by Mr. Fletcher? *Answer* - No, never. 3 RT 816:17-20.

Linda Castaldi: He (Fletcher) didn't say, you know, vote for this and I will do you a favor, or you have to vote for it. But this was the only time he had ever contacted me about ESO business. He knew that I was one of the few board members who had any favorable feelings towards this project and was likely to vote in favor of doing something, and he stressed how important it was for me to be at that next meeting. 7 RT 1818:16-22. *Question* -

Isn't it true that he never even mentioned the name Weathermaster to you? *Answer* - I don't recall that he mentioned the name to me. 7 RT 1819:14-16.

Arguably, the only board member whose comments could have supported the Mercury News' harsh contention was Joe Melino. However, the reporter knew that Melino was on the opposite side of the political fence from Fletcher 4 RT 1012:17-21, 1149:12-18; strongly opposed to the ESO insulation project, 6 RT 1576:26; and, had made a statement that he was personally going to bring Claude Fletcher down. 6 RT 1680:1-7, 4 RT 1149:4-11.

(e) The Appellate Court opinion seems to simply quote the trial court in many instances without independent review, "Herhold had no cause to doubt the reliability of his sources; they were, for the most part, inherently reliable. Indeed, Fulcher was the executive director of the ESO." 216 Cal.App.3d 189.

Herhold's notes of his interview with Fulcher suggest a somewhat different and possibly paranoid side to Fulcher that was never made public by the Mercury news but was brought out during trial. Herhold's notes indicated that at different times Fulcher had: (1) hid his family in his brother's apartment, (2) appealed to the authorities that his staff had accused him of stealing, (3) claimed that ESO staff had accused him of manipulating hiring practices, (4) asked the F.B.I. to investigate ESO, (5) bought a shotgun because of these problems, and (6) that some of his staff had filed a $400,000 lawsuit against him. 5 RT 1259:10-1261:14. Herhold's notes also show Fulcher stated "I think there was a feeling in the Hispanic community that I had come here to.....trash the Hispanic leadership in the community." 6 RT 1506:2-4

Defendants attempted to show that Fulcher was an unimpeachable witness, and therefore the Defendants' reliance upon Fulcher cured any libel problems which they otherwise might have had. The premise of this is, of course, untrue because of the many falsehoods in the articles not dealing with attribution to Fulcher. Moreover, Fulcher was not the "rock of Gibraltar" that the

Defendants wanted the court to believe. Perhaps the court did not have an opportunity to listen to the tape recording of the February 1983 ESO board meetings, but the jury obviously did. When one listens to those board meeting tapes, it readily becomes apparent that a crucial part of Fulcher's testimony falls by the way side, to wit, that a two page "proposed contract" which Fulcher claimed was given to him by Fletcher prior to February 9, 1983 could not have possibly been given to him by anyone until sometime after that meeting. The information which the board and Fulcher discussed on February 9 was printed in the proposed contract, and it was not decided until that board meeting what information the board would require so, obviously, it could not have been put into any document prior to that date.

Fulcher was also sorely impeached with his deposition testimony regarding the fact that in his deposition he clearly and at length testified that he had told Herhold he did not know what was in Fletcher's mind concerning the "something in it for you" statement and that he told Herhold that Fletcher could easily have been talking about something in it for the ESO agency as opposed to something in it for Fulcher personally. Yet at the time of trial, and shortly after he had dinner with the Mercury News vice-president and his own brother, who was having problems with his job at the Mercury News, he took the stand and brazenly testified that he was sure that the "something in it for you" statement could only have meant something akin to the bribe offer.

In spite of the trial judge comments, quoted by the Appellate opinion, it is respectfully submitted that the jury did not find Tommy Fulcher a credible witness.

(f) The opinion states, ".....Fletcher asked Fulcher to tell the Mercury News that Fulcher might have misinterpreted the Hawaii comments." 216 Cal.App.3d 189.

The court obviously took this statement from the trial court's written ruling without researching it. At trial, plaintiff's attorney had to revert back to Mr. Fulcher's deposition to clarify this statement:

"Mr. Delizonna - Page 36 of the April 8, '86, Depo-

sition of Mr. Fulcher, beginning at Line 5 through 24. *Question* - I want to make sure that we understand that, understand what you are saying. You told Mr. Oglesby that you had been under a lot of pressure then, meaning at the time you had had these various discussions with Claude, Right? *Answer* - Uh-huh. *Question* - Was that in fact true, that you had been under a lot of pressure? *Answer* - Uh-huh, yes. *Question* - And you also told Mr. Oglesby that there was a lot of stress in the air and the words I heard could have been interpreted in many ways? *Answer* - Right. *Question* - Now, was that in fact true? *Answer* - It was true, yeah. *Question* - So Claude Fletcher was asking you to make these statements, but the statements you were telling Oglesby were in fact true; is that right? *Answer* - Yeah. The thing is I never would have called Oglesby on my own because I didn't know him." 6 RT 1610:12-1611:12, emphasis added.

(g) The opinion states, "But to a group of seasoned reporters, Fletcher's interview statements and post-interview conduct may have appeared the ultimate verification for their story line." 216 Cal.App.3d 189, 190.

The court apparently did not have time to listen to the Mercury News/Fletcher interview tape. The jury obviously did, throughout the interview Fletcher stated that he had talked with various people about the weatherization program. However, he strongly denied ever "lobbying for his personal gain" as suggested by the reporters. Fletcher had urged that ESO do the insulation contract in-house. 3 RT 802, 4 RT 951:16-954, 6 RT 1570-1578. It should have been obvious to the Mercury News that Fletcher would not have taken such a position had he intended to "steer the contract for personal gain" to a private company. Also, the fact that Fletcher did not invest in Weathermaster until after the ESO contract had been given to other contractors should have allayed any concern that Fletcher was interested in the contract for personal gain. 4 RT 923. The Mercury News tape recording of their interview with Fletcher is also very revealing in that it reflects that Defendants' key people were misstating the facts to Fletcher. For example, in one portion of the tape they indicate that the board members were not merely stating that he was lobbying, but

were stating that he was lobbying "as hard as you could" to get that contract for Weathermaster. Trial transcript listed at 4 (d) on page 14 above shows that statement to be false. The jury found that, taken as a whole, the interview showed Fletcher was completely candid, factual, and helpful in offering any information (personal or public) the reporters wanted.

Statements related to the Fletcher/Mercury News interview and Fletcher's conduct following that interview in the Appellate Opinion at Cal.App.3d 189, 190 were taken verbatim from the trial court's written ruling which did not accurately reflect either statements from the interview or related facts established at trial.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Has Embraced an Improper Standard of Appellate Review

This Court held in New York Times Co. v. Sullivan, 376 U.S. 254,285 (1964), that an appellate court bears a constitutional obligation to "make an independent examination of the whole record." The Court reaffirmed this principle in Bose Corp. v. Consumers Union, 466 U.S. 485,514 (1984), and held that an appellate court must engage in a "de novo review," at 508 n.27, and "independently decide whether the evidence in the record is sufficient ..." id. at 511. Clearly, it requires an exhaustive, independent review of the record for the Court of Appeals to allow substitution of the trial court judge's view of the evidence for that of the jury in derogation of Fletcher's right to a jury trial as guaranteed by the Seventh Amendment.

Despite the constitutional obligation articulated in New York Times, 376 U.S. at 285, and Bose, 466 U.S. at 514, the Court of Appeals has, based on its written opinion, confined its review to few facts other than the trial court's written ruling. Indeed, the Court of Appeals opinion renders the obligation of independent review articulated in New York Times and Bose a nullity. This Court should grant certiorari in this case to make clear the contours of the requirement of independent appellate review.

II. A Basic Mistake of Law in the Appellate Court's Opinion Produced an Erroneous Result

The Court of Appeals opinion states that it decides only the appeal from the granting of the j.n.o.v. motion. 216 Cal.App.3d 178. But nowhere in the opinion is the proper method for determining a j.n.o.v. motion stated.

This Court has considered the question of the method of determining a j.n.o.v. motion in a public figure libel case. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby (1986), 477 U.S. 242,255. At trial the judge stated: "I don't decide who is right or who is wrong. The jury does that." 1 RT 247:7-8. "Now throughout this case it will be your (the jury's) exclusive duty to resolve all questions of fact in the case. I don't resolve any questions of fact, you do. You resolve them all. That is your exclusive duty, and in this regard you will determine the weight and effect of all the evidence." 2 RT 400:18-23.

Witkin notes, the rules governing the granting of a j.n.o.v. motion are identical to those for granting a non-suit. 7 Cal. Proc. 3d, Trial, §434-435, 409. See C.C.P. §629, Blake v. Hearst Publications (1946), 75 C.A. 2d 6. The cardinal requirement for granting a j.n.o.v. motion is that there be no substantial conflict in the evidence. Robinson v. North American Life (1963), 215 C.A. 2d 111, 118. That is to say, where there are conflicts in the evidence such that if the jury resolved those conflicts in plaintiff's favor the evidence would support the verdict, it is improper to grant a j.n.o.v. motion. More simply put, if the evidence presents a jury question, the motion should be denied. Alioto v. Cowles Inc. (9th Cir., 1975), 519 F.2d 777.

This time-honored method for deciding j.n.o.v. motions is not stated in the opinion, neither is it followed in the opinion. The issue on the j.n.o.v. motion is not

"whether there is clear and convincing evidence that the articles were published with actual malice" as stated in the Appellate Court Opinion at 216 Cal.App.3d 183, but it is instead whether, resolving all conflicts in the evidence in appellant's favor and drawing all justifiable inferences from the evidence in appellant's favor, any reasonable jury could find malice by clear and convincing evidence.

If this standard is followed in analyzing the evidence, then it is clear the trial court erred in granting the j.n.o.v. motion. For instance, the jury's verdict implies it disbelieved Herhold's lame explanation as to why his notes contradict his published version of David Van Nus' statement. 216 Cal.Ap.3d 188. The jury's verdict implies it believed Mr. Van Nus when he testified that he did not make the statement. The justifiable inference is that Herhold fabricated this statement. Fabrication is evidence of malice. St. Amant v. Thompson (1968), 390 U.S. 727, 732. This along with the multiple other fabrications at B.1.f. beginning on page 8 above is enough to show the j.n.o.v. motion should have been denied.

Finally, using the New York Times, supra, standard, the courts have found that where there is a demand for retraction or a claim of falsity by the person allegedly defamed, this alone is sufficient to present a jury question on the issue of constitutional malice. Church of Scientology v. Dell Publishing (N.D. Cal., 1973), 362 F. Supp. 767, 770 (republication after receipt of retraction demand); Nevada Ind. Broadcasting Corp. v. Allen (Nev., 1983), 664 P.2d 337, 345 (TV commentator reported to audience demand for apology but made none); Chase v. Daily Record (1973), 83 Wash. 2d 37, 515 P.2d 154, 158 (plaintiff telephoned editor prior to publication and informed him of falsity). This rule is eminently reasonable since clearly where the media defendant has been told of its error and proceeds to print, the jury may properly find actual knowledge of falsity under the New York Times standard.

Here, plaintiff held a news conference on March 8, 1984, which was covered by the Mercury News, during which he stated the falsity of the allegations in the

previous articles. CT 11. He also demanded retraction of the articles by letter on that date. CT 12-14. Furthermore, Mercury News editors had a meeting with plaintiff in February, 1984 prior to the publication of any of the articles during which he told them of the falsity of their allegations. 4 RT 1010:26-1011:15, 8 RT 2043:19-2049. This evidence alone was sufficient to present a jury question of constitutional malice. Scientology, supra; Allen, supra; Chase, supra. It is respectfully submitted that it was error to grant the Mercury News j.n.o.v. motion. Good Government Group v. Superior Court (1978), 223d 672, 685-686.

III. The Evidence Of Constitutional Malice Was Sufficient to Support the Jury's Verdict

In granting defendant Mercury News' motion for new trial, the trial court found "There is no credible evidence" of constitutional malice. CT 425:4-7

In New York Times, this Court held that the First Amendment prohibits a public official from recovering damages in a defamation action unless the plaintiff proves that the statements at issue were published with "actual malice," i.e., "knowledge" of their falsity or "reckless disregard" for the truth. 376 U.S. at 280.

In this case, plaintiff has shown a multiplicity of fabricated statements that were printed by the Mercury News. The six individuals recorded at B.1.f. beginning on page 8 above all insisted that quotes attributed to them were, in fact, fabricated by the reporter. In other words, the reporter knew the quotes were false because he created them. This surely meets the most strict definition of actual malice.

Additionally, since it is highly unlikely that the employees of a media defendant are going to take the witness stand and admit improper state of mind, the courts recognize that constitutional malice may be proved with circumstantial evidence. Reader's Digest Ass'n v. Superior Court (1984), 37 C.3d 244, 257-258. Using the New York Times standard, courts have recognized that several types of circumstantial evidence are probative on the issue of constitutional malice and may support a verdict.

Several of these types of evidence were presented to the jury here:

First, in Moore v. Bailey (1981), 628 S.W.2d 431, the Tennessee Court of Appeals found that evidence of a history of hostility between the parties was competent to show constitutional malice. 628 S.W. 2d 434. Here, there was evidence that Phil Trounstine, then a Mercury News reporter, had written a highly critical article about plaintiff in 1980 that contained fabrication. 4 RT 1015:12-1016:11, 5 RT 1194:12-21, 1430-1450. Mr. Trounstine described himself as "friendly" with a political opponent of plaintiff. 5 RT 1191:24-1193:16.

Second, evidence of present anger or hostility toward the plaintiff is sufficient to indicate constitutional malice. Reader's Digest, supra, 37 C.3d at 258; Jenoff v. Hearst Corp. (D. Md., 1978), 453 F. Supp., 541, 549 (hostile statement of reporters might show constitutional malice standing alone); DiLorenzo v. New York News (1980), 78 A.D.2d 669, 432 N.Y.S. 2d 483, 486-487 (reporter's hostility is evidence of constitutional malice). Here, there was evidence to show the hostility of the media defendant's employees, Phil Trounstine was "happy" that plaintiff had been defeated in his bid for re-election to the San Jose City Council. 8 RT 2214:1-20, 2244:12-19. Witness after witness testified to being cross-examined by Mercury News reporter Herhold in a manner described as "devious", 8 RT 2267:24, "obnoxious", 3 RT 674:22-676:2, "slick", 3 RT 866:5-11, and a "crusade" against plaintiff. 3 RT 820-822. Herhold made derogatory remarks about plaintiff during his interviews including calling plaintiff a "crook", 3 RT 649:22-650:3, which was the subject of a separate slander cause of action. He also stated, "We have to get people like this out of office." 3 RT 878:26-27.

Third, constitutional malice may be shown by evidence that information known by the media defendant which would refute its allegations was omitted from its articles. Buratt v. Capital City Press (1984), 459 So. 2d 1268, 1270-1271 (Louisiana Court of Appeal) (reporters summarized public records for articles but omitted record from summary which refuted charges); Montandon v. Triangle Publications (1975), 45 C.A. 3d 938

(TV magazine editors left impression that author was prostitute by omitting fact that other guest on show was prostitute.) Here, a Stanford journalism professor who had examined reporter Herhold's notes testified to information contained in the notes and omitted from the March 4th article, CT 7, which would tend to refute the story's allegations. 5 RT 1259:9-1261:18 Furthermore, Herhold omitted from his story the information that Fulcher made a statement which indicated he himself was not certain that any bribe attempt had been made. 6 RT 1613:17-1614:18, 7 RT 1974:6-21. Specifically, Fulcher said he didn't know whether the "There's something in it for you" statement had been directed at him personally or at the ESO agency. Fulcher told Herhold plaintiff could have been talking about the agency. Id.

Those statements never appeared anywhere in the Mercury News articles.

Fourth, where the media defendant simply fabricates information, this is evidence of constitutional malice. St. Amant v. Thompson (1968), 390 U.S. 727, 732. See Cochran v. Indianapolis Newspapers (1978), __ Ind. App. __, 372 N.E. 2d 1211, 1220-1222 (reporters attempted to obtain false statements about plaintiffs). If a false and defamatory statement is published with knowledge of falsity or a reckless disregard for the truth, the public figure may prevail. Harte-Hanks v. Connaughton 109 S. Ct. 2696 (1989). Again, the multiple fabrications outlined at B.1.f. beginning on page 8 above surely indicate adequate evidence of constitutional malice in this case.

Fifth, misleading headlines are evidence of constitutional malice. Hunt v. Liberty Lobby (11th Cir., 1983), 720 F.2d 631,646; Sprouse v. Clay Communications (1975), __ W. Va. __, 211 S.E. 2d 674 (headlines were not supported by facts recited in story). Here, the journalism professor testified that the banner headline of the March 4th article was misleading, 5 RT 1252:15-1254:10, as was the false headline "Salesmen no longer place Fletcher at meeting" on the March 31 article. 5 Rt 1275:1-14.

Sixth, the newspaper's decision not to listen to the

tapes of the February 1983 ESO board meetings also supports the finding of actual malice. Much of what Fulcher alleged could easily have been verified or disproved by listening to the tapes. One might reasonably infer that the decision not to listen to the tapes was motivated by a concern that they would raise additional doubts concerning Fulcher's veracity. Harte-Hanks v. Connaughton 109 S. Ct. 2693 (1989).

Seventh, the failure to investigate before publishing statements made by Vaine and Purcell may have given the jury the impression that the failure to conduct a complete investigation involved a deliberate effort to avoid the truth. The jury could infer constitutional malice from this. Harte-Hanks v. Connaughton 109 S. Ct. 2694 (1989).

Finally, the court in Bindrim v. Mitchell (1979), 92 C.A. 3d 61, 74 found that once errors have been called to the media defendant's attention, there is a duty to further investigate. The journalism professor testified it was standard journalistic practice to review the reporter's notes following a retraction demand. 5 RT 1273:27-1274:4. Reporter Hehold's supervising editors at the News testified they did not review his notes at any time. Neither did they do any other kind of investigation. 7 Rt 1835:9-14, 1854:27-28; 1919:13-14, 1928:5-16, 5 RT 1179:23-1180:4. The jury could infer constitutional malice from this.

Thus, through a cumulation of inferences from evidence of these types, the jury found clear and convincing evidence of constitutional malice. Reader's Digest, supra, 37 C.3d at 257 quoting Goldwater v. Ginzburg (2d Cir., 1969), 414 F.2d 324, 342 (cumulation and inference). It should be noted that there is a remarkable similarity between this case and the facts that supported the Court's judgment in Harte-Hanks v. Connaughton 109 S. Ct. (1989).

It must be emphasized here that, from the totality of the evidence presented to it, the jury could have inferred that the media defendant intentionally set out to discredit plaintiff during his reelection campaign, that is, the Mercury News' disregard of the truth was willful because it

wanted to see plaintiff defeated. Cf. Sprouse, supra, 211 S.E.2d 674. The initial information about the story came from one of plaintiff's political opponents who was angry and who had vowed to bring plaintiff down. 8 RT 2077:17-23; 2079:28, 7 RT 1990:3-11, 8 RT 2216:1-13, 6 RT 1680:1-7, 4 RT 1149:4-11, 5 RT 1184:7-1185:15, 8 RT 2082:9-17. The Mercury News editor who received the initial information proceeded to sit on it for a period of six months until the election campaign started to heat up, 5 RT 1188:22-1189:10, 1200:7-25, 1206:7-17, and it appeared as though plaintiff would have no re-election opposition. 4 RT 1052:13-14, 7 RT 1851:11-14. The editors made sure that the first story was published in their largest circulation edition with a front page banner headline on the Sunday immediately preceding the filing deadline for plaintiff's city council seat. 4 RT 925:2-14, 8 RT 2050:19-2051:3, 5 RT 1181:13-1183:15, 7 RT 1851:4-15, 1914:25-1915:22. The blatant fabrication of quotes for six different individuals at B.1.f. above. After plaintiff's defeat, Mercury News editor Trounstine was happy about it. 8 RT 2214:1-20, 2244:12-19. Since the evidence from which this conclusion of willful disregard could be drawn was largely undisputed, credibility determinations were irrelevant.

In light of the trial court's finding of no evidence of constitutional malice, CT 425:4, its summing up of its impressions on the new trial motion, CT 428:23-429:19, and its unusual incorporation in its decision of an editorial which was never seen by the jury, CT 418:21-419:9, 429:13-16, 433, it seems clear that it never considered that the jury's verdict could be based on the types of circumstantial evidence discussed here. Thus, the trial court's finding that the verdict was clearly against the weight of the evidence, CT 425:20-21, is in error and the motion for new trial should have been denied.

III. An Independent Examination of the Record in this Case Mandates Reinstatement of the Jury's Finding of Actual Malice

Had the Court of Appeals properly exercised its constitutional obligation to conduct an independent review of the entire record in this case, it would have concluded that plaintiff made the requisite showing of actual malice

under any standard of proof.

A review of the entire record discloses substantial probative evidence from which a jury could have concluded actual malice:

1. The Mercury News was prejudiced against Fletcher as evidenced by the personal relationship of Mercury News personnel with Fletcher's political opponents, and the previous unfavorable and incorrect news coverage afforded Fletcher;

2. The Mercury News was disappointed with and unwilling to accept the investigation of the top law enforcement official in the county and conducted its own questionable "investigation" against Fletcher in order to discredit him;

3. Fulcher's lunch with the Mercury News Vice President shortly before trial was revealing. Fulcher's brother, an employee of the Mercury News, was in jeopardy of losing his job. 6 RT 1566:12 - 1570:18;

4. Fulcher's apparent emotional instability and his strong recommendation of a non-minority contractor against the wishes of several of his board members creating a need to "lay the blame on someone else" afforded the Mercury News an ideal vehicle to accomplish its objectives;

5. The tapes of the ESO February board meetings proved that Fulcher's allegations could not have happened when he said they did and substantiate the statement in 4 above. The reporter supposedly decided not to listen to those tapes because he didn't think they contained any significant information. Thus, he consciously avoided pursuing clearly available means of making absolutely certain that Fulcher's statements were not false;

6. The "quotes" attributed to six different individuals were fabricated by Mercury News personnel. The six individuals came from different parts of the state and, with the exception of the Van Nus brothers, had no contact with or ties to each other;

7. The Mercury News knew of the allegations for over six months before publishing the articles. They knew that publication of Fulcher's allegations charging Fletcher with "bribery" coupled with accusations of a conflict of interest would completely discredit and irreparably damage Fletcher personally and politically;

8. The publication date of the first article was determined after a special meeting with the senior editor and a specific discussion of the filing deadline for Fletcher's city council seat. They timed the release of the initial story immediately before the filing deadline for the upcoming election so as to encourage an opponent against Fletcher;

9. A number of witnesses, including, O'Day, Kiewit, Sethne, Fullerton, Scott, and Father Goda, indicated the Mercury News reporter was determined to get Fletcher out of office, attempted to get them to agree to his dates of events, and tried to put words in their mouths against Fletcher; and

10. Trial testimony refuted the Mercury News' harsh and negative connotations on the "lobbying" allegations in the first article.

It is respectfully submitted that the above cited facts alone mandate the Court should grant certiorari on this case.

CONCLUSION

The First Amendment was never intended as a vehicle to immunize from liability the media entity that intentionally misuses its power in forcing from office public officials it disagrees with.

If the New York Times rule is to retain vitality, a plaintiff who makes as overpowering a showing of harm, falsity and actual malice as was made in this case must prevail on appeal.

If this Court does not grant certiorari, it will accomplish three undesirable ends:

1. Sound the death-knell for public figure libel claims and reduce the right to gain redress for the big political lie to a mirage, practically unattainable;

2. Deprive Petitioner of the benefit of the jury's findings in violation of the Seventh Amendment.

3. Plunge appellate review of public figure libel judgments into the "thorny thicket" of uncharted confusion, leaving each judge free to arrive at his own view of the evidence without regard to this Court's view as expressed in Harte-Hanks v. Connaughton.

Accordingly, it is respectfully requested that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

California Court of Appeals, Sixth District
Opinion
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California Court of Appeals, Sixth District
Denial of Petition For Rehearing
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California Supreme Court
Denial of Petition For Review
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Transcript of District Attorney Tape of conversation between Fletcher and Fulcher
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[No. H002265. Sixth Dist. Nov. 9, 1989.]

CLAUDE FLETCHER, Plaintiff and Appellant, v.
SAN JOSE MERCURY NEWS et al., Defendants and Respondents.

SUMMARY

In a public official's action for libel and slander against a newspaper and its reporter, the trial court granted defendants' motion for nonsuit regarding the slander action and granted defendants' motion for judgment notwithstanding the verdict after the jury returned a verdict in plaintiff's favor in the libel action, on grounds there was not clear and convincing evidence that the statement was made with actual malice. The libel action stemmed from a series of articles reporting the official's conflict of interest regarding a contract between a city board and a company with whom the official had invested. The slander action stemmed from the reporter's statements that the official was "a crook" and "I don't want him to be reelected," when interviewing a potential witness for the article. (Superior Court of Santa Clara County, No. 547402, Frank Cliff, Judge.)

The Court of Appeal affirmed. It held that neither the evidence of defendants' past hostility toward plaintiff, interviewing style, present hostility, lack of objectivity, nor the reporting of an erroneous quote were sufficient to establish lack of belief in the accuracy of the articles so as to establish the requisite actual malice to sustain plaintiff's libel action. It also held that the reporter's statements to the witness were statements of opinion and were not actionable as slander. (Opinion by Elia, J., with Capaccioli, Acting P. J., and Premo, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Appellate Review § 120—Dismissal—Grounds—Mootness—What Constitutes—Order Granting New Trial—Affirmation of Order Granting Motion for Judgment Notwithstanding the Verdict.**—Where the appellate court affirms the trial court's order granting a motion for

judgment notwithstanding the verdict, it need not consider the appeal from an order granting a new trial, since that appeal is rendered moot.

(2) **Constitutional Law § 55—Scope and Nature—Freedom of Speech and Expression—Speech Concerning Public Affairs.**—An essential purpose of U.S. Const., 1st Amend., is to protect the discussion of public affairs. Discussion of such issues has always rested on the highest rung of the hierarchy of First Amendment values. This is because speech concerning public affairs is not just self-expression; it is the essence of self-government.

[See **Am.Jur.2d,** Constitutional Law, § 456 et seq.]

(3) **Constitutional Law § 57—Scope and Nature—Freedom of the Press—Criticism of Public Officer.**—The public possesses an independent interest in the qualifications and performance of its public officials. Accordingly, debate on public issues may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. When a candidate enters the political arena, he or she must expect that the debate will sometimes be rough and personal. An elected official cannot complain when an industrious news reporter attempts to establish that the official has less than sterling integrity. The press plays a vital role in the discussion of public affairs. The press serves and was designed to serve as a powerful antidote to any abuses of power of governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. The press is our citizenry's single most important check on governmental misconduct and secrecy. A free press is an integral part of a free society.

(4) **Libel and Slander § 45—Actions—Evidence—Presumptions and Burden of Proof—Malice.**—In order for a public official to recover damages for libel, he or she must not only prove that a statement was false, but must also prove that the statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. There must be clear and convincing proof of either deliberate falsification or reckless publication despite the publisher's awareness of probable falsity. In determining whether there is evidence of actual malice, the test is not whether a reasonably prudent man would have published, or would have investigated before publishing. There must be evidence of actual doubt concerning the truth of the publication. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive where a story is fabricated by the

defendant, is a product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of an informant or the accuracy of his reports.

[See Cal.Jur.3d (Rev), Assault and Other Wilful Torts, § 148 et seq.]

(5) **Libel and Slander § 50—Actions—Province of Court and Jury—Issue of Actual Malice.**— The issue of actual malice in a libel action is of such constitutional magnitude that it is not entrusted ultimately to the judgment of the trier of fact. Courts must make an independent constitutional judgment on the facts of the case. All evidence of malice must be independently reviewed, and the court must independently determine the constitutional import of any particular witness's testimony as it relates to the question of actual malice.

(6) **Libel and Slander § 48—Actions—Evidence—Weight and Sufficiency—Malice—Reporter's Past Hostility Toward Plaintiff.**— In a public official's action for libel, the trial court properly granted defendant newspaper's and its reporter's motion for judgment notwithstanding the verdict on the ground there was no clear and convincing evidence that the articles complained of were published with actual malice. Plaintiff did not establish malice with evidence of an article written by an editor that was highly critical of plaintiff and by a citation to the fact that the editor was friendly with one of plaintiff's political opponents. The critical article did not demonstrate that the reporter did not believe his articles were true. Moreover, the role of the press includes publishing articles that are highly critical of public officials. In addition, the fact that the editor, who did not author the complained of articles, was friendly with a political opponent of plaintiff's, fell far short of the clear and convincing proof required to establish actual malice.

(7) **Libel and Slander § 48—Actions—Evidence—Weight and Sufficiency—Malice—Reporter's Interviewing Style.**—In a public official's action for libel, the trial court properly granted defendant newspaper's and its reporter's motion for judgment notwithstanding the verdict on the ground there was no clear and convincing evidence that the articles complained of were published with actual malice. Plaintiff's allegation that a news reporter interviewed witnesses in a "slick," "devious," and "obnoxious" manner wholly failed to demon-

strate that the reporter did not believe that the complained of articles were true. The fact that a reporter is aggressive and abrasive in attempting to ferret out information from reluctant individuals is no more than evidence of zealous investigative reporting. The characterization of the reporter did not raise a question about the reporter's belief in the truth of the story.

(8) **Libel and Slander § 48—Actions—Evidence—Weight and Sufficiency—Malice—Reporter's Present Hostility Toward Plaintiff.**—In a public official's action for libel, the trial court properly granted defendant newspaper's and its reporter's motion for judgment notwithstanding the verdict on the ground there was no clear and convincing evidence that the articles complained of were published with actual malice. Plaintiff's stating that the reporter called him a "crook" and stated "we have to get people like this out of office" did not raise an inference that the articles complained of were published with reckless disregard for the truth. Ill will and constitutional malice are not the same. Ill will toward a plaintiff and bad motives are not elements of the actual malice standard required to state a cause of action for libel. For plaintiff's argument to succeed, he must have linked the reporter's statements to the reporter's awareness of probable falsity of the complained of articles. Moreover, this evidence suggested that the reporter believed that the allegations against plaintiff were true.

(9) **Libel and Slander § 48—Actions—Evidence—Weight and Sufficiency—Malice—Reporter's Lack of Objectivity.**—In a public official's action for libel, the trial court properly granted defendant newspaper's and its reporter's motion for judgment notwithstanding the verdict on the ground there was no clear and convincing evidence that the articles complained of were published with actual malice. Although plaintiff submitted expert testimony from a journalism professor that the newspaper and its reporters had failed to follow certain accepted journalism practices and were less than objective in presenting the story about plaintiff, in applying a constitutional test there is no requirement that an article be objective. Nor is there a requirement that a publisher write an accurate account. Fair and objective reporting may be a worthy ideal, but there is also room, within the protection of U.S. Const., 1st Amend., for writing that seeks to expose wrongdoing and arouse righteous anger; clearly such writing is typically less than objective in its presentation. Public figure libel cases are controlled by the actual malice constitutional standard and not by the professional standards rule. Further, the complained of articles did present plaintiff's side of the story such that they could not be said to

be completely one-sided. Plaintiff's retraction demand did not necessarily lead the newspaper and reporter to doubt the truthfulness of the article or its sources.

(10a, 10b) **Libel and Slander § 48—Actions—Evidence—Weight and Sufficiency—Malice—Erroneous Quote in Newspaper Article.**—In a public official's action for libel, the trial court properly granted defendant newspaper's and its reporter's motion for judgment notwithstanding the verdict on the ground there was no clear and convincing evidence that the articles complained of were published with actual malice. Plaintiff did not demonstrate actual malice by alleging that the reporter fabricated information, notwithstanding the erroneous quotation of a witness and other factual errors in the complained of articles. Although there was a conflict between the reporter's notes and what he wrote in the articles, this did not demonstrate with convincing clarity that the reporter believed the allegations concerning plaintiff's misconduct were unfounded. Further, the evidence demonstrated a sincere attempt to report what defendants viewed as plaintiff's unethical conduct. The reporter researched the matter for over one month, interviewed numerous witnesses, accurately quoted a key source, and interviewed plaintiff himself.

(11) **Libel and Slander § 7—Actionable Words—Errors.**—Mere errors are not enough to support a libel claim. Erroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the breathing space they need to survive.

(12a, 12b) **Libel and Slander § 10—Actionable Words—As to Public Officers and Candidates—Statements of Opinion.**— The trial court properly granted a newspaper's and its reporter's motion for nonsuit in a public officer's slander cause of action. Although the reporter stated that plaintiff "was a crook and a crooked politician and I don't want him to be reelected," the circumstances demonstrated that the statements were an opinion. The reporter was trying to obtain corroborating information from a witness, and in so doing used inflammatory language in an effort to persuade the witness to talk. Where potentially defamatory statements are published in a setting in which the audience may anticipate efforts by the party to persuade others to their position by use of epithets, fiery rhetoric, or hyperbole, language that generally might be considered as statements of fact may well assume the character of statements of opinion. Moreover, because the statement "I don't want him reelected" was added to the reporter's comments, it was clear that the reporter was merely expressing his opinion about plaintiff. The reporter was not charging plaintiff with a

specific crime; instead the statements were broad, unfocused, and subjective comments.

(13) **Constitutional Law § 55—Freedom of Speech and Expression—Statements of Opinion.**— Under U.S. Const., 1st Amend., there is no such thing as a false idea. However pernicious an opinion may seem, its correction does not depend on the conscience of judges and juries, but on the competition of other ideas. To determine whether a statement is fact or opinion the court considers the totality of the circumstances. This requires that the court consider the language used and the context in which the statement was made.

COUNSEL

Harry J. Delizonna and Tim Provis for Plaintiff and Appellant.

Pillsbury, Madison & Sutro, Walter R. Allan, Edward P. Davis, Jr., Kevin M. Fong and Joseph A. Hearst for Defendants and Respondents.

OPINION

ELIA, J.—This is an action for libel and slander brought by appellant Claude Fletcher, a former San Jose City councilman, against respondents San Jose Mercury News, Knight-Ridder Publications and Mercury News reporter Scott Herhold.

The libel claim arose after the Mercury News published a series of articles reporting on Fletcher's conduct as a member of the board of economic and social opportunities (ESO), a local antipoverty agency. The slander cause of action resulted from allegations that Herhold described Fletcher as a "crook" and a "crooked politician."

Respondents' motion for nonsuit was granted as to the slander cause of action. A jury trial on the libel claim resulted in a verdict for Fletcher. He was awarded $250,000 in general damages, $25,000 in special damages, and punitive damages totalling $735,000.

Respondents' motion for judgment notwithstanding the verdict was granted by the trial court on the ground that there was no clear and convincing evidence that the articles were published with actual malice.

Respondents' motion for a new trial was also granted on the basis that the verdict was against the weight of evidence and because of error in the giving of certain jury instructions.

Fletcher appeals the granting of the motions for nonsuit, judgment notwithstanding the verdict, and new trial. (1) (See fn. 1.) We affirm.[1]

Facts and Procedural Background

Shortly after his election to the San Jose City Council in 1980, Fletcher was appointed by San Jose Mayor Janet Gray Hayes to the board of ESO. ESO is a nonprofit agency established to help low income residents of Santa Clara Valley obtain funding from local, state and federal authorities.

In early 1983, ESO had an opportunity to sponsor a program which would provide weatherization for the homes of low income persons. At a January 24, 1983, ESO board meeting, the ESO board members, including Fletcher, discussed whether the weatherization work should be completed in-house or contracted out to private companies. Fletcher volunteered to research companies which might be suitable for the project. The board asked Fletcher to report on this research in two weeks.

As part of his research, Fletcher contacted a business called Weathermaster. Fletcher was familiar with Weathermaster and the company's sales manager, Archie Westfall, because Fletcher had worked for Weathermaster in the late 1950's. Fletcher spoke with Westfall about the ESO weatherization program and ultimately concluded Weathermaster should be awarded the project. During his conversations with Westfall, Fletcher learned that Westfall was considering buying out Weathermaster.

Shortly thereafter, Fletcher contacted Reppie Bautista, the chairperson of the ESO board, to tell her he could not attend the February 8 ESO board meeting due to a schedule conflict. Bautista told Fletcher to inform the other board members of the results of Fletcher's research. Fletcher telephoned some of the board members and recommended that the project be handled by Weathermaster.

During the latter part of February 1983, Westfall called Fletcher to ask if he wanted to invest in Westfall's takeover of Weathermaster. Fletcher said he would think about it. Fletcher spoke with his administrative assistant,

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[1] Because we affirm the trial court's order granting the motion for judgment notwithstanding the verdict, we need not consider the appeal from the order granting a new trial since it is rendered moot. (Code Civ. Proc., § 629; *Conner* v. *Utah Constr. & Mining Co.* (1965) 231 Cal.App.2d 263 [41 Cal.Rptr. 728].)

Chuck Walton, about possible conflicts of interest. Walton and Fletcher agreed that Fletcher should not attend the February 28, 1983, ESO board meeting.

Fletcher, who was seriously considering Westfall's proposition, eventually decided to resign from the ESO board and submitted his letter of resignation on March 9, 1983.

On March 30, 1983, Fletcher and Westfall agreed to go into business together as 50 percent partners. Fletcher withdrew $40,000 from his savings account and deposited it into a Weathermaster account at the Bank of America in Milpitas.

Weathermaster submitted a bid for the ESO project on or about March 23, 1983. The ESO contract was awarded to a different company on March 28, 1983. However, Weathermaster did receive a fraction of the ESO weatherization work.

In July 1983, Phillip Trounstine, an editorial writer for the San Jose Mercury News, and Joe Melino, a member of the ESO board, attended a party in San Jose. At the party, Melino told Trounstine that Fletcher had tried to steer an ESO contract to a company called Weathermaster. Melino said Fletcher had a financial interest in the company while he was on the ESO board. Melino stated that he had asked Father Paul Goda, another ESO board member, to persuade Fletcher to resign from the agency due to Fletcher's relationship with Weathermaster.

Trounstine asked Melino to contact Goda to see if Goda would be willing to talk to Trounstine about Fletcher. A few weeks later, Melino reported that Goda was unwilling to speak to Trounstine.

In January 1984, Trounstine received information that the Santa Clara County District Attorney's office had investigated an alleged bribe attempt involving Fletcher and the executive director of ESO, Tommy Fulcher. Trounstine turned the information over to Mercury News reporter Scott Herhold for investigation.

Herhold immediately began investigating the story. As part of his research, Herhold contacted ESO board members Fulcher, Melino, Linda Castaldi, Jo Fields, YaYa DeLuna, and Miles Barber. Herhold also spoke with David Davies of the district attorney's office. Herhold interviewed several individuals connected with Tag Industries, the company which leased office space for Weathermaster's Milpitas office. These individuals included Leif Sethne, James O'Day, Gina Franconi, and Jack Kiewit.

Finally, Herhold, Herhold's editor, Mark Saylor, and the news editor of the Mercury news, Roger Ogelsby, interviewed Fletcher on February 27, 1984. This interview was tape-recorded and played for the jury.

THE MARCH 4, 1984, ARTICLE

Herhold's first article appeared on Sunday, March 4, 1984, as the lead story, under the headline "Fletcher lobbied for own firm, agency officials say." The article, which is set forth in full in the appendix, went on for approximately 75 paragraphs to describe the allegations against Fletcher.

Much of the article detailed Fulcher's allegations against Fletcher. Herhold reported that (1) Fletcher brought Westfall to Fulcher's office and recommended that Weathermaster be given the ESO contract; (2) Fletcher asked whether Fulcher and his wife would like to take a trip to Hawaii. Fulcher interpreted this comment as a bribe; (3) Fletcher told Fulcher that "'You know, there's something in this for you'"; (4) Fletcher handed Fulcher a contract awarding the contract to Weathermaster and asked Fulcher to sign it; and (5) Fletcher told Fulcher that "'I've really got to have this contract. You promised me this contract and I made some financial commitments. I'm out on a limb for $40,000.'"

The March 4, 1984, article also described how Fletcher had lobbied several ESO board members to convince them to award the ESO contract to Weathermaster. ESO board member Joe Melino was quoted as stating, "'I was extremely upset . . . I didn't think it was appropriate for a board member to act in that manner when he had apparent interest in a firm doing business with the agency.'"

Near the end of the story, Herhold reported that Westfall and Fletcher had visited the Tag office and the Milpitas Weathermaster office in late February or early March 1983. Herhold's sources for this information were Leif Sethne, James O'Day and the leasing agent for the Milpitas office. According to Sethne, Fletcher and Westfall visited Tag's office and discussed buying supplies and acquiring office space. In early March 1983, Westfall reportedly told O'Day that Fletcher was a 49 percent partner in Weathermaster. Finally, the leasing agent, who was not named in the article, reportedly "showed Westfall and Fletcher around the Milpitas office building in February or early March."

Interspersed throughout the story were rebuttals to the allegations against Fletcher. For example, the article noted that (1) Fletcher denied Fulcher's allegations and claimed that his partnership with Westfall did not commence until after he resigned from the ESO board; (2) the district

attorney's office had failed to uncover sufficient evidence to warrant prosecution of Fletcher; and (3) all of Fletcher's financial documents demonstrated that he had no financial interest in Weathermaster until late March 1983.

THE MARCH 6, 1984, ARTICLE

The second article appeared on March 6, 1984, and was headlined "Fletcher helped firm before leaving agency, 2 say." The March 6 article included allegations by two Weathermaster saleswomen, Kaye Vaine and Donna Purcell. In substance, Vaine and Purcell stated that Fletcher and Westfall were present at a March 1, 1983, Weathermaster sales meeting. Vaine alleged that Westfall and Fletcher "boasted" that they would receive the weatherization contract. Purcell was quoted as stating, "'I think Claude Fletcher was involved quite a bit before we got involved, . . . He didn't just get into it then. He knew what he was talking about.'"

The rest of the March 6, 1984, story summarized the information previously reported on March 4, 1984. The article also repeated Fletcher's denials of wrongdoing.

THE MARCH 8, 1984, ARTICLE

Herhold's third article was published on March 8, 1984, and was titled "Fletcher to hold news conference on conflict of interest allegations." This article repeated Fletcher's denials, noted that Fletcher would hold a news conference to discuss the allegations and summarized the information in the previous articles.

THE MARCH 10, 1984, ARTICLE

The fourth article appeared on March 10, 1984, and was headlined "Fletcher had earlier link to company, employees say." The article quoted two former Weathermaster salesmen, brothers David and Dutch Van Nus, as stating that Fletcher had attended a January 1983 Weathermaster sales meeting in Fresno. According to David Van Nus, Fletcher attended "'six or seven'" Weathermaster meetings from January through March 1983. Herhold reported that David Van Nus believed Fletcher and Westfall had formed their partnership to obtain the weatherization contract from ESO. The article quoted David Van Nus as stating, "'There's absolutely no doubt in my mind that Claude Fletcher was involved in Weathermaster before March 1.'" This quote was set out in bold and oversize type.

Dutch Van Nus was also cited in the March 10, 1984, story. According to Dutch Van Nus, nothing was mentioned at the Fresno meeting about

Fletcher becoming a partner in Weathermaster. Dutch Van Nus was quoted as stating, "'He was just introduced as "Claude Fletcher," who used to work for us.'" The rest of the March 10 article reiterated Fletcher's denials of impropriety and summarized the information previously reported.

The March 31, 1984, Article

The final article was published on March 31, 1984, under the headline "Salesmen no longer say Fletcher was at meeting." Herhold reported that Dutch Van Nus had denied making the statements in the March 10 story and instead claimed that the first time he saw Fletcher was in late March 1983. Herhold wrote that David Van Nus confirmed seeing Fletcher at several San Jose Weathermaster meetings before March 1983. However, David Van Nus could not be sure he had seen Fletcher in Fresno in January 1983. Herhold reported that David Van Nus said he was misquoted in the March 10 article and had not intended that his comments be publicized.

Events at Trial

At trial, Sethne, O'Day, and Jack Kiewit, the previously unnamed leasing agent, testified that they did not make the statements attributed to them in the March 4 story. The Van Nus brothers also stated that they were inaccurately quoted. In particular, David Van Nus stated that he told Herhold that he had doubt in his mind about whether Fletcher was involved with Weathermaster prior to resigning from the ESO board. As previously noted, the March 10 article quoted Van Nus, in bold face type, as stating, "'There's absolutely no doubt in my mind that Claude Fletcher was involved in Weathermaster before March 1.'"

Fulcher testified that Herhold had accurately reported his statements. Fulcher also testified that before the articles were published, Herhold contacted him approximately three to five times to make sure Herhold's interview notes were accurate. Likewise, Joe Melino testified that the statements attributed to him in the March 4 article accurately portrayed his comments. Both Kaye Vaine and Donna Purcell testified that Herhold's account was accurate. Finally, the testimony of the other ESO board members confirmed that Fletcher contacted them to recommend Weathermaster.

The jury returned a verdict for Fletcher on the libel cause of action and awarded him damages totalling $1,010,000. The trial court, however, granted respondents' motion for judgment notwithstanding the verdict on the ground that actual malice was not proved by clear and convincing evidence. This appeal followed.

DISCUSSION

I. Libel

The issue before us is whether there is clear and convincing evidence that the articles were published with actual malice. Before addressing this point, we first set out the applicable law.

(2) An essential purpose of the First Amendment is to protect the discussion of public affairs. (*Garrison* v. *Louisiana* (1964) 379 U.S. 64, 74-75 [13 L.Ed.2d 125, 132-133, 85 S.Ct. 209].) Discussion of such issues "has always rested on the highest rung of the hierarchy of First Amendment values." (*Carey* v. *Brown* (1980) 447 U.S. 455, 467 [65 L.Ed.2d 263, 273, 100 S.Ct. 2286].) This is because speech concerning public affairs is not just self-expression; it is the essence of self-government. (*Garrison* v. *Louisiana, supra,* 379 U.S. at p. 75 [13 L.Ed.2d at p. 133].)

(3) "The public possesses an 'independent interest' in the qualifications and performance of its public officials." (*McCoy* v. *Hearst Corp.* (1986) 42 Cal.3d 835, 859 [231 Cal.Rptr. 518, 727 P.2d 711], quoting *Rosenblatt* v. *Baer* (1966) 383 U.S. 75, 85-86 [15 L.Ed.2d 597, 605, 86 S.Ct. 669].) Accordingly, debate on public issues "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (*New York Times Co.* v. *Sullivan* (1964) 376 U.S. 254, 270 [11 L.Ed.2d 686, 700-701, 84 S.Ct. 710, 95 A.L.R.2d 1412].) "When a candidate enters the political arena, he or she 'must expect that the debate will sometimes be rough and personal, . . .'" (*Harte-Hanks Communications, Inc.* v. *Connaughton* (1989) 491 U.S. __ [105 L.Ed.2d 562, 588, 109 S.Ct. 2678, 2695], quoting *Ollman* v. *Evans* (D.C. Cir. 1984) 242 App.DC 301 [750 F.2d 970] (Bork, J., conc.), cert. den., 471 U.S. 1127 [86 L.Ed.2d 278, 105 S.Ct. 2662].) An elected official cannot "cry Foul!" when an industrious reporter attempts to establish that he or she has less than sterling integrity. (*Harte-Hanks Communications, Inc.* v. *Connaughton, supra,* 491 U.S. __ [105 L.Ed.2d at p. 588, 109 S.Ct. at p. 2695], quoting *Monitor Patriot Co.* v. *Roy* (1971) 401 U.S. 265, 274 [28 L.Ed.2d 35, 42, 91 S.Ct. 621].) Indeed, nothing is more alien to our national tradition than the notion that those in positions of public trust and authority are above criticism and must, at any price, be afforded the smiling admiration of the people.

The press plays a vital role in the discussion of public affairs. "[T]he press serves and was designed to serve as a powerful antidote to any abuses of power of governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." (*Mills* v. *Alabama* (1966) 384 U.S. 214, 219 [16

L.Ed.2d 484, 488, 86 S.Ct. 1434].) The press is "our citizenry's single most important check on governmental misconduct and secrecy." (*McCoy* v. *Hearst Corp., supra,* 42 Cal.3d at p. 859.) It is perhaps telling that throughout modern history the restriction of the press's freedom to report has always signaled the gradual degradation of the idea of liberty itself. A free press is simply an integral part of a free society. This principle was recognized by the founders of our nation over 200 years ago and remains a vital part of our national heritage today.

(4) It is in this tradition, and to safeguard these principles that the law of libel has developed. In order for a public official to recover damages for libel, he or she must not only prove that a statement was false but must also prove that the statement was made with " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (*New York Times Co.* v. *Sullivan, supra,* 376 U.S. at pp. 279-280 [11 L.Ed.2d at p. 706].) There must be clear and convincing proof "of either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity' . . . ." (*St. Amant* v. *Thompson* (1968) 390 U.S. 727, 731 [20 L.Ed.2d 262, 267, 88 S.Ct. 1323], quoting *Curtis Publishing Co.* v. *Butts* (1967) 388 U.S. 130, 153 [18 L.Ed.2d 1094, 1110, 87 S.Ct. 1975].)

In determining whether there is evidence of actual malice, the test is not "whether a reasonably prudent man would have published, or would have investigated before publishing." (*St. Amant* v. *Thompson, supra,* 390 U.S. at p. 731 [20 L.Ed.2d at p. 267].) There must be evidence of *actual doubt* concerning the truth of the publication. (*Reader's Digest Assn.* v. *Superior Court* (1984) 37 Cal.3d 244, 257 [208 Cal.Rptr. 137, 690 P.2d 610].)

In *St. Amant* v. *Thompson, supra,* 390 U.S. 727, the United States Supreme Court clarified the actual malice requirement: "The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." (*Id.* at p. 732 [20 L.Ed.2d at pp. 267-268].)

(5) Finally, we note that the issue of actual malice is of such constitutional magnitude that it is not entrusted ultimately "to the judgment of the trier of fact." (*Bose Corp.* v. *Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 501, fn. 17 [80 L.Ed.2d 502, 517, 104 S.Ct. 1949]; *McCoy* v. *Hearst,*

supra, 42 Cal.3d at p. 844.) Courts must make an independent constitutional judgment on the facts of the case. (*New York Times* v. *Sullivan*, *supra*, 376 U.S. at p. 285 [11 L.Ed.2d at p. 709].) All evidence of malice must be independently reviewed and the court must "independently determine the constitutional import of any particular witness's testimony as it relates to the question of actual malice." (*McCoy* v. *Hearst*, *supra*, 42 Cal.3d at p. 846.) With these principles in mind, we now turn to the arguments raised by appellant.

Appellant contends that actual malice was established by clear and convincing evidence. He points to several examples of circumstantial evidence to argue that respondents knew the articles contained false statements. We examine each of these contentions below.

A. Past Hostility

(6) Appellant states that evidence of past hostility between the parties is competent to establish malice. Appellant relies upon a 1980 article, written by Trounstine, which was "highly critical" of appellant. Appellant also cites the fact that Trounstine described himself as "friendly" with one of appellant's political opponents.

There is little doubt that this evidence, by itself, is not enough to establish malice. A critical article written by Trounstine in 1980 hardly demonstrates that Herhold did not believe the March 1984 articles were true. Moreover, the role of the press includes publishing articles which are highly critical of public officials. As stated in *Rosenblatt* v. *Baer*, *supra*, 383 U.S. 75, 85 [15 L.Ed.2d at p. 605]: "Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized." In addition, the fact that Trounstine, who did not author the 1984 articles, was "friendly" with a political opponent of Fletcher's, falls far short of the clear and convincing proof required to establish actual malice.

B. Interview Style

(7) Appellant next claims that evidence regarding Herhold's interview style suffices to show malice. He points to testimony that Herhold interviewed witnesses in a "slick," "devious" and "obnoxious" manner and tried to put words in the witness's mouth.

This testimony, while less than complimentary of Herhold's personal attributes, wholly fails to demonstrate that Herhold did not believe the articles were true. The fact that a reporter is aggressive and abrasive in attempting to ferret out information from reluctant individuals is, in itself,

hardly surprising. We think that Herhold's interview style evinced no more than evidence of "zealous investigative reporting." (*Jenoff* v. *Hearst Corp.* (D.Md. 1978) 453 F.Supp. 541, 549-550, affd. (4th Cir. 1981) 644 F.2d 1004 [reporter called plaintiff and stated, " 'We know all about you, and you better confess,' " and also told plaintiff that he would " 'burn' " if he did not corroborate certain facts].) Suffice it to say that characterizing a reporter as "slick" or "devious" does not, in our minds, trigger a question about that reporter's belief in the truth of the story.

C. Present Hostility

(8) Appellant also points to the fact that Herhold allegedly called Fletcher a "crook" and stated "We have to get people like this out of office." Once again, appellant relies upon Herhold's personal attitudes to raise an inference that the articles were published with reckless disregard for the truth. In so doing, appellant confuses the concept of actual malice with ill will or "malice" in the ordinary sense of the term.

Ill will and constitutional malice are not the same. " '[I]ll will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard.' " (*Letter Carriers* v. *Austin* (1974) 418 U.S. 264, 281 [41 L.Ed.2d 745, 760, 94 S.Ct. 2770], quoting *Rosenbloom* v. *Metromedia Inc.* (1971) 403 U.S. 29, 52, fn. 18 [29 L.Ed.2d 296, 317, 91 S.Ct. 1811]; see also *Harte-Hanks Communications, Inc.* v. *Connaughton, supra,* 491 U.S. __ [105 L.Ed.2d at p. 576, 109 S.Ct. at p. 2685].) For appellant's argument to satisfy the *New York Times* standard, appellant must link Herhold's statements to Herhold's awareness of probable falsity. Appellant, however, fails to make this connection. Not only do Herhold's statements fail to show that the articles were published with reckless disregard for the truth but, if anything, the statements suggest Herhold believed that the allegations against Fletcher were true. Given the information provided by Fulcher, which Fulcher confirmed at trial, Herhold's opinions seem only a "reaction to what he had learned in preparing to write the article, and [do] not indicate a state of mind that would suggest that he had serious doubts about the article's veracity." (*Reader's Digest Assn.* v. *Superior Court, supra,* 37 Cal.3d at p. 260, [while preparing article, defendant wrote letter which stated that the plaintiff seemed "very, very nasty indeed."]; see also *Flotech, Inc.* v. *E.I. Du Pont de Nemours & Co.* (1st Cir. 1987) 814 F.2d 775, 781-782 [author's letter referring to plaintiffs as " 'Snake-Oil Producers' " consistent with a belief that story was true].) In sum, we see nothing in Herhold's statements which suggests a willingness to publish unsupported allegations.

D. Lack of Objectivity

(9) Appellant argues that misleading headlines, the fact that information was omitted from the stories and a failure to further investigate

constitute evidence of malice. Appellant supports his argument with testimony from a Stanford University journalism professor, Jeremy Cohen. At trial, Cohen testified that respondents had failed to follow certain accepted journalism practices and were less than objective in presenting the story about Fletcher.

It is of course a general maxim in journalism that a story be reported in an objective manner. We are not told, however, whose standard of objectivity is to be applied. Is it the editor's, the reporter's or indeed a more ethereal definition of objectivity that guides the author's account? When it comes to the complicated task of subjecting an allegedly libelous article to constitutional scrutiny, we are mindful of Lord Macaulay's observation that "nothing is so useless as a general maxim." (On Machiavelli (1827).)

In applying a constitutional test we note that there is no requirement that an article be objective. (*Reader's Digest Assn.* v. *Superior Court, supra,* 37 Cal.3d at p. 259, citing *New York Times Company* v. *Connor* (5th Cir. 1966) 365 F.2d 567, 576.) Nor is there a requirement that a publisher write an accurate account. (*Reader's Digest Assn.* v. *Superior Court, supra,* 37 Cal.3d at p. 259, citing *Time, Inc.* v. *Pape* (1971) 401 U.S. 279 [28 L.Ed.2d 45, 91 S.Ct. 633].) "Fair and objective reporting may be a worthy ideal, but there is also room, within the protection of the First Amendment, for writing which seeks to expose wrongdoing and arouse righteous anger; clearly such writing is typically less than objective in its presentation." (*Reader's Digest Assn.* v. *Superior Court, supra,* 37 Cal.3d at p. 259.)

Appellant suggests that the failure to follow professional journalism standards, as outlined by Professor Cohen, constitutes actual malice. However, this court does not sit " 'as some kind of journalism review seminar offering our observations on contemporary journalism and journalists.' " (*Tavoulareas* v. *Piro* (D.C. Cir. 1987) 817 F.2d 762, 796, citing *Tavoulareas* v. *Piro* (D.C. Cir. 1985) 759 F.2d 90, 145 [J. Skelly Wright, conc. in pt. and dis. in pt.].) The question we face is whether respondents believed the articles were untrue, not whether their reporting practices passed Professor Cohen's test. As recently declared by the Supreme Court in *Harte-Hanks Communications, Inc.* v. *Connaughton, supra,* 491 U.S. __ [105 L.Ed.2d 562, 109 S.Ct. 2678], "Today, there is no question that public figure libel cases are controlled by the *New York Times* standard and not by the professional standards rule, which never commanded a majority of this Court." (*Id.* at p. __ [105 L.Ed.2d at p. 576, 109 S.Ct. at p. 2685].)

In any event, these articles did present Fletcher's side of the story, so they cannot be said to be completely one-sided. While the articles were clearly not a model of "objective reporting," they were not as slanted as appellant

suggests. The March 4 story stated (1) Fletcher's contention that he had no financial interest in Weathermaster until after he resigned from the ESO Board; (2) that the documentation bore out Fletcher's claim; and (3) that the district attorney's office concluded there was insufficient evidence to warrant prosecution. Moreover, each of the follow-up articles repeated Fletcher's denials of wrongdoing. In addition, on March 9, 1984, the Mercury News published a transcript of Fletcher's news conference in which Fletcher detailed his position.

Finally, appellant contends that a retraction demand notified respondents of the need for additional investigation. This same argument was rejected in *Reader's Digest Assn.* v. *Superior Court, supra,* 37 Cal.3d at page 260, "The threat of a libel suit . . . might well give a publisher pause, but it would not necessarily lead it to doubt the truthfulness of its article or its sources." As stated in *New York Times* v. *Sullivan, supra,* 376 U.S. at page 279 [11 L.Ed.2d at page 706], "[T]he critic of official conduct . . ." is not compelled "to guarantee the truth of all his factual assertions . . ." for "to do so on pain of libel judgments virtually unlimited in amount" results in "self-censorship."

E. Erroneous Quote

(10a) Appellant also contends that malice was demonstrated by the fact that Herhold fabricated information. Appellant cites the March 10 story quoting David Van Nus as stating, "There's absolutely no doubt in my mind that Claude Fletcher was involved in Weathermaster before March 1." At trial, Van Nus testified that he had "doubt in my mind" about whether Fletcher was involved.

Herhold testified that the quote accurately portrayed Van Nus's comments. However, Herhold's notes of his interview with Van Nus state, "'There is no, absolutely'—I have 'doubt in my mind that Claude Fletcher was involved in Weathermaster before March 1.'" When asked to explain the discrepancy, Herhold stated, "I was searching to try to put down as closely as I could his exact language, and I was trying to recall in my mind whether he said there's absolutely no doubt in my mind or I have no doubt in my mind, and I wrote down both beginnings, and in doing so mistakenly left out the 'no.'"

Although the conflict between Herhold's notes and what Herhold wrote is troubling, we do not think it demonstrates with convincing clarity that Herhold believed the allegations against Fletcher were unfounded. When Herhold interviewed Van Nus, he was attempting to corroborate the information already provided by other sources. Given the information Herhold

had already discovered, the Van Nus quote was not so improbable as to support the inference that Herhold had deliberately falsified Van Nus's remarks. (*Weingarten* v. *Block* (1980) 102 Cal.App.3d 129, 147 [162 Cal.Rptr. 701].) Moreover, Herhold's good faith is demonstrated by the fact that the March 31 story included Van Nus's claim that the March 10 article had misquoted him.

In sum, we conclude the evidence of actual malice is neither clear nor convincing. Perhaps Herhold did not like Fletcher. After hearing Fulcher's comments, this opinion is hardly surprising. And perhaps the Mercury News articles were less than objective. Clearly the articles contained factual errors. But was there clear and convincing evidence that Herhold did not believe his story was true?

We do not think so. To the contrary, the evidence suggests a sincere attempt to report what the Mercury News viewed as unethical behavior on the part of a San Jose public official. Herhold spent over one month researching this story. He interviewed approximately 20 persons as part of his investigation. Herhold's key source, Fulcher, was accurately quoted, as were the allegations attributed to the other ESO board members. Herhold had no cause to doubt the reliability of his sources; they were, for the most part, inherently reliable. Indeed, Fulcher was the executive director of the ESO. (Compare *Harte-Hanks Communications, Inc.* v. *Connaughton, supra,* __ U.S. __ [105 L.Ed.2d 562, 109 S.Ct. 2678] [Newspaper failed to interview key witness, failed to listen to crucial taped interview and published charges of misconduct based upon statement by one witness even though five other witnesses stated the charges were untrue].)

In addition, Fletcher himself was interviewed by respondents before the articles were published. The tape recording of this interview is revealing. During the interview, Fletcher stated, "I saw a chance to move into that [weatherization] field and I took that opportunity, yes, and granted, it did come about because of that investigation on behalf of the public agency, sure it did . . ." Yet at the same time, Fletcher stated that the weatherization contract "was simply a tangent—well—it was just a minor part . . . it had nothing to do with what ESO was doing . . . that contract with ESO was not the motivating factor."

During the interview, Fletcher flatly denied making the statement regarding the trip to Hawaii. Yet after the interview, Fletcher asked Fulcher to tell the Mercury News that Fulcher might have misinterpreted the Hawaii comments. Fulcher reported this conversation to the Mercury News.

As the trial court noted, such disclaimers would be unconvincing to most reasonable people. But to a group of seasoned reporters, Fletcher's

interview statements and postinterview conduct may have appeared the ultimate verification for their story line.

In sum, the most these circumstances show is a series of articles which contained some factual errors. **(11)** But mere errors are not enough to support a libel claim. "[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'." (*New York Times* v. *Sullivan, supra,* 376 U.S. at p. 271-272 [11 L.Ed.2d at p. 701], quoting *N.A.A.C.P.* v. *Button* (1963) 371 U.S. 415, 433 [9 L.Ed.2d 405, 418, 83 S.Ct. 328].)

(10b) We conclude that actual malice was not proved by clear and convincing evidence and therefore affirm the trial court's order granting respondents' motion for judgment notwithstanding the verdict.

II. SLANDER

(12a) Respondents' nonsuit motion as to the slander cause of action was granted on the ground Herhold's comments were a constitutionally protected statement of opinion. For reasons we will state, we conclude that the trial court did not err in granting the motion.

After the first few articles were published, Herhold interviewed David Scott, a former employee of Weathermaster. In his testimony, Scott described how Herhold tried to persuade Scott to corroborate information about Fletcher. During their conversation, Herhold allegedly stated that Fletcher "was a crook and a crooked politician and I don't want him to be reelected."

Were Herhold's statements fact or opinion? **(13)** This question is crucial because "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." (*Gertz* v. *Robert Welch, Inc.* (1974) 418 U.S. 323, 339-340 [41 L.Ed.2d 789, 805, 94 S.Ct. 2997], fn. omitted.)

To determine whether a statement is fact or opinion we consider the "totality of the circumstances." (*Baker* v. *Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260 [228 Cal.Rptr. 206, 721 P.2d 87].) This requires that we consider the language used and the context in which the statement was made. (*Id.* at pp. 260-261.)

(12b) We think that the circumstances here demonstrate that Herhold's statements were an opinion. Herhold was merely attempting to obtain

corroborating information from Scott and in so doing used inflammatory language in an effort to persuade Scott to talk. Where "potentially defamatory statements are published in a . . . setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." (*Gregory* v. *McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 601 [131 Cal.Rptr. 641, 552 P.2d 425]; see also *Lewis* v. *Time Inc.* (9th Cir. 1983) 710 F.2d 549, 553.) Moreover, because the statement, "I don't want him reelected" was added to Herhold's comments, it seems clear that Herhold was merely expressing his opinions about Fletcher.

In sum, Herhold's comments, we think, were merely rhetorical and hyperbolic language. Herhold was not charging Fletcher with a specific crime. Instead, the statements were a broad, unfocused and wholly subjective comment. (*Lewis* v. *Time Inc., supra,* 710 F.2d at p. 554 [lawyer referred to as "shady practitioner."].) Indeed, in *Lauderback* v. *American Broadcasting Companies* (8th Cir. 1984) 741 F.2d 193, the court concluded that referring to an insurance agent as a "crook" constituted a statement of opinion. (*Id.* at pp. 197-198.)

"It is an essential part of our national heritage that an irresponsible slob can stand on a street corner and, with impunity, heap invective on all of us in public office." (*Desert Sun Publishing Co.* v. *Superior Court* (1979) 97 Cal.App.3d 49, 51 [158 Cal.Rptr. 519].) Indeed, "Our political history reeks of unfair, intemperate, scurrilous and irresponsible charges against those in or seeking public office. Washington was called a murderer, Jefferson a blackguard, a knave and insane (Mad Tom), Henry Clay a pimp, Andrew Jackson a murderer and adulterer, and Andrew Johnson and Ulysses Grant drunkards. Lincoln was called a half-witted usurper, a baboon, a gorilla, a ghoul. Theodore Roosevelt was castigated as a traitor to his class, and Franklin Delano Roosevelt as a traitor to his country. Dwight D. Eisenhower was charged with being a conscious agent of the Communist Conspiracy." (*Id.* at p. 51.) Suffice it to say that good taste has never been a prerequisite to First Amendment protections.

Herhold's statements simply reflected his opinion about Fletcher based upon the information Herhold learned while pursuing the story. His opinion is protected under the First Amendment of the United States Constitution.

We conclude that the trial court did not err in granting respondents' motion for nonsuit on the slander cause of action.

The judgment is affirmed.

Capaccioli, Acting P. J., and Premo, J., concurred.

San Jose Mercury News 3/4/84 p. 1A

Fletcher lobbied for own firm, agency officials say

(picture omitted)

"The suggestion that I would even consider to influence anyone improperly is absurd."

— *Claude C. Fletcher*

By Scott Herhold
Staff Writer

San Jose Councilman Claude C. Fletcher, while serving last year on the board of directors of Santa Clara County's largest anti-poverty agency, tried to steer a $1.6 million contract to a firm in which he became a partner, according to five officials of the agency.

Fletcher says he left the board of the agency, Economic & Social Opportunities Inc., to avoid a conflict of interest. But two ESO officials and two men who did business with Fletcher suggest that the councilman had a financial interest in the firm, an insulation business called Weathermaster Co., before he resigned from the ESO board on March 9, 1983.

Tommy Fulcher Jr., the executive director of ESO, said he and Fletcher had several conversations in which the councilman lobbied for Weathermaster as a contract recipient. During one of those, Fulcher said, Fletcher asked him whether he and his wife would like to take a trip to Hawaii.

Fulcher said he rejected the offer, which he interpreted as a bribe.

Fletcher denied the allegations. "The suggestion that I would even consider to influence anyone improperly is absurd," he said.

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(picture omitted)

"He just kind of slipped it in: 'How would you and your wife like a trip to Hawaii?"

— *Tommy Fulcher Jr.*

Continued from Page 1A

The 45-year-old councilman, a management consultant and political conservative, attributed the allegations against him to a "political vendetta" that he said began with his investigation into ESO's accounting procedures two years ago.

Fletcher said his position as an ESO board member allowed him to spot a business opportunity that turned a profit for him after his resignation.

District Attorney Leo Himmelsbach's office, told of the charges by Fulcher in May, spent several months investigating Fletcher's business dealings.

Assistant district attorney David Davies said the investigation failed to

uncover sufficient evidence for criminal prosecution. Davies said the evidence showed that Fletcher did not have a financial interest in the insulation firm until after he resigned from the ESO board.

But Davies said the district attorney's office had not served search warrants or subpoenas for Fletcher's bank records or office records. He said his investigators examined records Fletcher supplied.

Davies acknowledged that it was possible that his investigators may have missed something.

"Occasionally, you come up with something that we may have missed. All we can do is look at what's available and then make a decision," he said.

"We had some statements that were definite. But we had some other statements that were very contradictory. On the surface, all the documentation supports Fletcher's story."

In interviews with the Mercury News, two ESO officials and two businessmen who shared an office building with Fletcher said that before he resigned from the ESO board, the councilman either acted on behalf of the firm or told them that he had a financial stake in the company. Three of those sources said they were not contacted by the district attorney.

In addition, a leasing agent for the Milpitas office building that Fletcher's insulation company occupied said Fletcher was present when the new tenants inspected the quarters. The leasing agent says his datebook reveals that he showed the property March 4, 1983.

According to ESO board members, Fletcher lobbied hard during February and March 1983 to direct the ESO contract for insulating poor people's homes to the Weathermaster Co., a firm that he formally incorporated in April with a Fresno partner, Archie Westfall.

The insulation company, which had offices at 1000 Ames Avenue in Milpitas, ultimately received only a fraction of the ESO contract.

Although Fletcher called the business "very profitable," he said he ended the partnership in January of this year because "I simply did not enjoy the association of the people involved."

The state's Political Reform Act says that "no public official at any level of state or local government shall make, participate in making, or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

Davies, the assistant district attorney, said he believes the law applies to the ESO board. He pointed out that Fletcher was appointed to the board as San Jose's official representative.

ESO, a private, non-profit agency, runs programs intended to benefit the poor. Like most other anti-poverty agencies afflicted by Reagan-era cutbacks, it has sought ways to raise money from sources other than government.

In December 1982, an opportunity arose. A consortium of anti-poverty agencies, called Cal-Neva, received approval from Pacific Gas & Electric Co. and the state Public Utilities Commission to begin a $22 million-per-year program to insulate the homes of the poor for free. The costs were charged to all electricity ratepayers.

Cal-Neva contracted with local anti-poverty agencies such as ESO. With PG&E paying an average of about $800 per house, ESO could make as much as $100 on each. The anti-poverty agency also stood to make a bonus of as much as $180,000 for completing all 2,100 homes in its allotment.

The 11-member ESO board first considered the venture at its Jan. 24, 1983, meeting—and the board members were skeptical.

Embarrassed two years before by the collapse of Project Greenhouse, an ill-conceived attempt to make money by growing gourmet cucumbers, the ESO board was on the verge of rejecting the

contract when Fletcher volunteered to look for a subcontractor to assume the risks.

By his own account, Fletcher turned for advice to an old acquaintance, Archie Westfall, a veteran salesman and former pheasant rancher. Fletcher and Westfall had worked together as salesmen more than 20 years before at Weathermaster Co., an insulation firm in Fresno. (The two firms of the same name are separate businesses.)

Fletcher said he cannot remember whether he spoke with Westfall before or after ESO began considering the contract. But the councilman said he learned in "mid- to late February" that Westfall intended to sever his relationship with his longtime Fresno partner, R. Donald Smith.

"In talking with Westfall, I saw the business was going to have a change," Fletcher said. "I said (to myself), 'Why not move into that void and why not make a profit from it?' And I did that."

"I have no way of knowing why (Fulcher) would tell you that. Why hasn't he ever mentioned it to me? If he ever had an offer, it certainly should have been brought out."

— *Councilman Claude C. Fletcher*

The councilman insisted that he did not begin his partnership with Westfall until late March, after he resigned from the ESO board. According to records provided by Fletcher, his $40,000 investment in the firm was deposited in the bank March 30.

Fletcher denied that he had lobbied any board member or ESO executive for Weathermaster before his resignation.

Fletcher also downplayed the importance of the ESO contract to Weathermaster, saying it was not his motivation for going into business with Westfall. But Westfall offered a conflicting version.

"The reason I wanted to come to San Jose was because of the low-income business," Westfall said. "When I met Claude, I set up the office, and then he became involved down the line."

Several ESO officials and Fletcher business acquaintances tell a story that sharply departs from Fletcher's version. Chief among them is ESO's director, Fulcher, a Vietnam War veteran and two-time Bronze Star recipient with a master's degree in business administration from Harvard University.

According to the ESO director, Fletcher brought Westfall by the ESO offices about a week after the agency's January board meeting, warmly recommending him for the contract.

"It appeared as if he was saying, 'Let us handle the contract,'" Fulcher recalled.

Over the next month, Fulcher said, he had numerous telephone calls and went to lunch twice with Fletcher—by his datebook, Jan. 31 and Feb. 7. According to the ESO director, Fletcher became more aggressive in his attempts to secure the contract for Weathermaster.

Fletcher billed the city for a $14.82 lunch with Fulcher on Jan. 31 at Plateau 7. During that meeting, Fulcher said, the councilman told him, "You know, there's something in this for you." Fulcher said he ignored that comment.

In a meeting at Fletcher's City Hall office before the second lunch, according to Fulcher, Fletcher handed him a proposed contract between Weathermaster and ESO and asked him to sign it.

"I told him no, it had to go by the board," Fulcher remembered. "He said, 'The board's already given you permission to do this project.' I said,

'Yes, but they didn't give me permission to sign a contract.' "

Fulcher has given the Mercury News a copy of that unsigned contract, which calls for all of ESO's insulation business to be directed to Weathermaster and for ESO to receive a 5 percent administration fee. The contract was to begin March 15.

Fletcher said he had never seen the contract before. "I don't personally remember that contract," Fletcher said. "I knew that Tommy could not execute such a contract."

In a series of ensuing phone calls, Fulcher said, Fletcher pressed him harder, saying at one point, " 'I've really got to have this contract. You promised me this contract and I made some financial commitments. I'm out on the limb for $40,000.' "

According to Fulcher, the councilman called him at home, and "we were talking about the contract, and he just kind of slipped it in: 'How would you and your wife like a trip to Hawaii?' "

Fulcher says he rejected the offer.

"I told him I had been to Hawaii six times and I wasn't interested in going again," he said.

Fletcher flatly denied the allegation of a bribe. "I have no way of knowing why he would tell you that," Fletcher said. "Why hasn't he ever mentioned it to me? If he ever had an offer, it certainly should have been brought out."

"I didn't think it was appropriate for a board member to act in that manner when he had apparent interest in a firm doing business with the agency."

— ESO board member Joe Melino

Fulcher said his initial reaction to the offer was shock, followed by outrage.

"I was really in a quandary," Fulcher said. "It scared me. I didn't know what he was doing. I thought maybe he was trying to set me up. It was like being sick, like walking around with a migraine headache, wondering whether they were going to come and snatch me up."

Fulcher said he did not go immediately to the district attorney, although he did tell some other board members about the offer. Board member Joe Melino confirmed that Fulcher told him that Fletcher had offered him a bribe.

"I had to talk to people," Fulcher said. "I had to think it through. I really didn't want to go (to the district attorney). I was afraid. I didn't want to get involved in politics. I was hoping it would go away."

At its March 28 meeting, the ESO board of directors tentatively decided to award the ESO insulation contract to a consortium of Hispanic bidders. One reason, according to several board members, was the irritation with Fletcher's lobbying on behalf of Weathermaster.

"I was extremely upset," Melino said. "I didn't think it was appropriate for a board member to act in that manner when he had apparent interest in a firm doing business with the agency."

Among the other ESO board members who say Fletcher lobbied them were Melino, Linda Castaldi, YaYa DeLuna, Jo Fields and Miles Barber. Melino and Castaldi say they were called in February. Fields, DeLuna and Barber say their calls came in March.

With the exception of Barber, the board members said that when Fletcher called, they believed he was still a board member. Barber said he cannot remember whether Fletcher already had resigned. Fields said Fletcher told her during the conversation that he intended to resign.

Ultimately, the lobbying bore little fruit. Not until October, after the contract was divided up among a number of subcontractors, did Weathermaster receive an ESO contract—and then for only 50 homes.

Fulcher says he didn't approach the district attorney until May, after Fletcher confronted ESO's weatherization program manager, Larry Dowd, about Weathermaster's lack of a contract.

"It had gone far enough," Fulcher said.

The ESO director says he first talked with City Attorney Robert Logan.

"I wanted some advice about what to do," he said. "I wanted to know if I was doing something illegal by not reporting it. I wanted it kept in confidence."

Logan declined to comment about any conversations he had with the ESO director or with Fletcher. "The answer to that is with the district attorney's office," Logan said.

Assistant district attorney Davies initially declined comment on the probe. But after a request by Fletcher, the district attorney's office released a statement to the Mercury News two weeks later.

Davies said the investigation had shown that "all the evidence" showed that Fletcher did not have any interest in the Weathermaster firm until March 25, 1983. Davies declined to say what that interest was.

Including Fulcher, four of Fletcher's fellow board members or business acquaintances suggested to the Mercury News that Fletcher's financial interest in Weathermaster predated his resignation from the ESO board.

One of their contentions is that Fletcher, before his resignation, visited the 1000 Ames Avenue site that Weathermaster occupied and the nearby offices of Tag Industries, a major supplier of Weathermaster.

Leif Sethne, a director of Tag Industries, which is now defunct but moved into the Ames Avenue building with Weathermaster, said Fletcher and Westfall came by Tag's offices in late February to discuss buying supplies and acquiring office space.

Sethne said he assumed Fletcher was in business with Westfall. The Tag director said the conversation occurred well before he left with his wife for Hawaii on March 8, 1983.

Sethne's recollection was backed up by James O'Day, the former president of Tag, who confirmed that Fletcher stopped by his offices in late February or very early March.

O'Day said he had a conversation at the beginning of March with Westfall, who told him Fletcher was a "49 percent" partner in Weathermaster.

The leasing agent for the Ames Avenue building, who asked that his name not be used, says he showed Westfall and Fletcher around the office building in February or early March.

After initially denying that he had been at the building until April, Fletcher said that "it's possible" that he stopped by to look at the property while driving around with Westfall. "But I don't recall being there until April," he said.

Finally, ESO board member Melino said Fletcher called him in March and lobbied hard for Weathermaster. Melino quoted Fletcher as saying that "I've got a personal interest in this, you know." Although Melino said he can't remember the precise date, he said he wasn't aware of Fletcher's intention to resign at the time of the phone call.

Sethne, O'Day and Melino said the district attorney did not talk to them. The leasing agent said an investigator called him in October or November and interviewed him only on the telephone.

On the incorporation papers filed for the firm on April 15, Fletcher was listed as the "agent for service," meaning that he accepted legal papers for the firm. On later documents, he was described as its vice president and chief financial officer.

Westfall, 58, was listed as the chief executive officer. Fletcher called him a "highly capable guy" who knew the insulation business.

But a number of people disagree with that assessment of Westfall. In Fresno, Superior Court files show that

two judgments have been entered against him on behalf of creditors who claimed that Westfall did not pay them for supplies. The amounts are $9,000 and $17,000. In a third case, Westfall was sued for $11,500. All three firms who sued say the debts still have not been paid.

Westfall's former firm, Beneficial Brokerage, a building supply firm, was investigated by the State Board of Equalization in 1977 for non-payment of sales tax. A report by an administrative hearing officer, Donald J. Hennessy, recommended that fraud penalties be exacted against Beneficial.

Westfall said he paid a back tax bill of $6,800 and cleared himself of the fraud charges. He called himself an "innocent bystander" in Beneficial's problems, although he acknowledged he was listed as its president.

San Jose Mercury News 3/6/84 p. 1A

Fletcher helped firm before leaving agency, 2 say

By Scott Herhold
Staff Writer

Two saleswomen who worked for San Jose Councilman Claude Fletcher in his insulation business last year said Monday that Fletcher was recruiting a sales force at least a week before he resigned as a director of an anti-poverty agency from which the insulation firm sought a contract.

The statements of the two women raise fresh questions about whether the councilman, who was the chief financial officer of a firm called Weathermaster Co., had a financial interest in the business before he left the board of Economic & Social Opportunities Inc.

Fletcher has denied any conflict of interest and insisted that his financial involvement in Weathermaster began only after his resignation on March 9, 1983, from the board of ESO, the anti-poverty agency.

But the statements by the two women, Kaye Vaine, 36, of San Jose, and Donna Purcell, 41, who now lives in Alberta, Canada, contradict the councilman's version.

Vaine said she attended a meeting on March 1, 1983, at which Fletcher and his partner in the Weathermaster firm, Archie Westfall, boasted that they would receive a contract for insulating low-income homes. She said the meeting at the Seasons Restaurant on Monterey Road in San Jose was called to recruit sales people for the fledgling insulation firm.

"Basically the thrust of his (Fletcher's) conversation was that they had already made the application and that he had every reason to believe he would be chosen," Vaine said. "The told us they were going to have an exclusive on the contract in Santa Clara County."

Weathermaster, which had offices at 1000 Ames Ave. in Milpitas, was one of the companies vying for a $1.6 million contract that ESO

Continued on Page 6A

Fletcher helped company before leaving agency, 2 say

Continued from Page 1A

administered for insulating poor people's homes. The program was funded by Pacific Gas & Electric ratepayers.

Ultimately, Weathermaster won only a tiny fraction of the work.

The Mercury News reported Sunday that five officials of the anti-poverty agency, including executive director Tommy Fulcher Jr., said that Fletcher attempted to steer the ESO contract to Weathermaster while still an ESO director.

Fletcher could not be reached for comment Monday on the women's statements, although phone messages were left at both his home and office.

Earlier in the day, however, he issued a statement to other members of the San Jose City Council.

"Sunday's Mercury News article was extremely inaccurate and unfair and portrays me in a false light," he said. "We are in the process of going through my records for the purpose of accurately setting forth all the facts. I should finish this task in the next few days. At that time, I will set forth the whole truth of what occurred and I feel confident the public will agree with me

that the Mercury News staff did a very sloppy job of reporting or for some other reason has misstated the information it collected."

District Attorney Leo Himmelsbach's office, informed of the conflict charges last May by ESO's director, Fulcher, spent several months examining Fletcher's business dealings.

The district attorney concluded that there was insufficient evidence to prosecute and that the documentation showed that Fletcher's interest in Weathermaster began after his resignation from the ESO board.

On Monday, Himmelsbach said, "I don't really think I should publicly comment. We've generally had a policy that we don't comment on investigations, at least during an investigatory stage."

Himmelsbach declined to say whether his office was re-opening the investigation. But he hinted that it may: "Our office is always willing to follow a new lead in any investigation," he said. "I don't know that we should be concerned about what the source of the lead is. If we receive new information that might shed some light on it, we're willing to look at it."

(picture omitted)

Claude Fletcher
. . . *Plans public denial*

The state's Political Reform Act says that "no public official at any level of state or local government shall make, participate in making, or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

Kaye Vaine's 1983 datebook shows that she attended the sales meeting on Tuesday, March 1, eight days before Fletcher's departure from the ESO board. Purcell, while not remembering the precise date, said she believes the meeting occurred at the beginning of March.

Like several other people who suggested to the Mercury News that Fletcher's financial interest in Weathermaster began before his resignation, both women say they were not contacted by the district attorney.

Vaine worked as a sales representative for Weathermaster for two months, with Purcell staying a few months longer. Both said they were angered at Fletcher because of what they said was Weathermaster's niggardly policy in paying its sales people.

"We were promised the sky and it never came," Vaine said. "I felt that Archie and Claude would never give me a straight answer. Whenever I had a question, I got a fast shuffle."

"Claude happens to be a city councilman, and he has the inside track on getting us the contract. . . ."

— *Kay Vaine quoting Archie Westfall in substance*

In describing the March 1 meeting, which they said was attended by about 20 salespeople, both women remembered that Fletcher and Westfall sounded confident that Weathermaster would receive the low-income contract.

"I think Claude Fletcher was involved quite a bit before we got involved," Purcell said. "He didn't just get into it then. He knew what he was talking about."

Vaine, who now works for ESO determining whether low-income people qualify for the weatherization program, said that Westfall spoke first, explaining that they would be insulating homes under PG&E's zero-interest loan program and introduced Fletcher as a partner in Weathermaster.

"Now that Claude has joined us, we have a wonderful opportunity to offer to all of you," she remembered Westfall saying. Vaine said that Westfall bragged that they had an "exclusive" on receiving a contract for insulating low-income homes.

"Claude happens to be a city councilman," she quoted Westfall as saying in substance. "And he has the inside track on getting us the contract. The wheels are in motion. We expect to have it."

Both women said Weathermaster promised $50 per household that the salespeople were able to enlist for the program.

Vaine said she attended weekly meetings for six to seven weeks after the March 1 meeting. She said the number of people attending the sales meetings dwindled because Weathermaster trimmed the commissions it promised.

Staff Writer Maline Hazel contributed to this report.

San Jose Mercury News 3/8/84 p. 1B

Fletcher to hold news conference on conflict of interest allegations

By Maline Hazle
Staff Writer

San Jose Councilman Claude Fletcher said he will hold a news conference at 2 p.m. today to discuss allegations that he tried to steer a $1.6 million anti-poverty agency contract to a firm in which he became a partner.

Fletcher has denied any conflict of interest and says his financial involvement in Weathermaster Co., an insulation firm, began only after his March 9, 1983, resignation from the board of Economic & Social Opportunities Inc.

The Mercury News reported Sunday that ESO Executive Director Tommy Fulcher and four other ESO officials said Fletcher, while still an ESO board member, lobbied for the award of the insulation contract to Weathermaster.

Fletcher has denied that he had lobbied any board member or ESO executive for Weathermaster before his resignation. He also said he did not have a financial interest in Weathermaster until late March 1983, after his resignation from the ESO board.

But on Monday, two saleswomen who worked for Weathermaster said Fletcher was recruiting a sales force at least a week before his resignation from the board.

Weathermaster later received only a small fraction of the $1.6 million contract. Fletcher's partnership in the firm was terminated in January, he said.

Meanwhile, San Jose City Attorney Bob Logan said Wednesday that city laws only prohibit *former* council members from becoming involved in businesses affected by decisions they made as council members. The law forbids such business relationships for a year after council members leave office.

"The idea of any 'revolving door' ordinance is to catch them on the way out," Logan said. "No, it does not apply to Fletcher. He's still a member of the council."

"There are no other ordinances in the city municipal code to cover business activities while they are in office."

Logan said that "we've got a state law that would do what needs to be done" about business dealings of officeholders.

The state's Political Reform Act says that "no public official at any level of state or local government shall make, participate in making, or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

Logan declined to say whether he believes that the state law applies to Fletcher's case.

"That's up to the district attorney's office," he said. "I'm not going to second-guess them."

District Attorney Leo Himmelsbach's office spent several months investigating the ESO allegations but did not find sufficient evidence for prosecution. Deputy district attorney Dave Davies has said he believes the state law would cover the actions of a San Jose council member serving on the ESO board.

At Fletcher's request, Himmelsbach's office released a statement last week saying the investigation has ended. Himmelsbach has refused to say whether he is reopening the investigation as a result of Mercury News accounts.

(picture omitted)

Claude Fletcher
. . . *Denies any conflict*

Many of the people who spoke with the Mercury News said they had not been contacted by the district attorney.

San Jose council members have been close-mouthed about the allegations.

"Councilman Fletcher stated in his memo of March 5 that the facts were inaccurately reported in the Mercury News article and that he will be releasing information shortly which proves this," Mayor Tom McEnery said Wednesday. "In all fairness to Mr. Fletcher, reaching a conclusion on this matter would be premature at this time."

Other council members agreed.

"What we do could do harm and damage to whatever is the truth if we go off half-cocked before Claude has a chance," Iola Williams said. "To comment would not be appropriate."

Councilman Jim Beall said he wants to "sit back and listen" to Fletcher before commenting.

Fletcher was appointed to the ESO board two years ago by then-Mayor Janet Gray Hayes. The city has a representative on the board of the private, non-profit agency because part of the city's federal Community Development Block Grant fund goes to the agency.

This year the city gave $80,000 to ESO, $50,000 to a program for the handicapped and $30,000 to the Citizens' Home Energy Project, a 6-year-old home insulation program that is not connected to the contract sought by Fletcher's firm.

San Jose Mercury News 3/31/84 p. 1A

Salesmen no longer say Fletcher was at meeting

By Scott Herhold
Staff Writer

Two former salesmen for the Weathermaster Co., an insulation firm in which San Jose Councilman Claude Fletcher was a partner, have changed their accounts of Fletcher's involvement in the business last year.

The two salesmen, Dutch and David Van Nus, who are brothers, told the Mercury News in separate March 7 interviews that they met Fletcher at Weathermaster offices in Fresno in January 1983.

But on Wednesday, Dutch Van Nus denied that he had made that statement. He said Wednesday that the

Salesmen no longer place Fletcher at meeting

Continued from Page 1A

first time he saw Fletcher was when he helped the councilman move into Weathermaster offices at 1000 Ames Avenue in Milpitas in late March 1983.

David Van Nus confirmed his March 7 comments that he had seen Fletcher at several Weathermaster sales meetings in San Jose before early March 1983. But he said he could not be sure that he had seen Fletcher in Fresno.

"It was all my opinion," David Van Nus said. "I saw Claude at meetings in San Jose. I thought I saw him in Fresno. I wasn't planning on remembering every detail."

The timing has become significant because Fletcher resigned from the board of directors of Economic & Social Opportunities Inc., the anti-poverty agency from which Weathermaster sought a contract, on March 9, 1983.

The councilman has said he resigned from the board in time to avoid any conflict of interest arising from his involvement in Weathermaster. Fletcher has said he didn't become a partner in Weathermaster until weeks after he resigned from the ESO board.

Fletcher also has denied other ESO officials' charges that he lobbied them on behalf of Weathermaster while still on the board.

Five ESO officials have said Fletcher, while serving on the board, tried to sway a $1.6 million contract for insulating poor people's homes to Weathermaster.

Fletcher has said that the earliest Weathermaster sales meeting he recalls attending was March 1, 1983, and that he attended that meeting only as a friend, not as a partner.

Neither of the Van Nus brothers called the Mercury News to complain about the March 10, 1984, article in which the were quoted. They were contacted after the newspaper learned that their comments to the district attorney's office differed from their statements to a reporter.

"It was all my opinion. . . . I thought I saw him in Fresno. I wasn't planning on remembering every detail."

— *David Van Nus, salesman*

On Wednesday, Dutch Van Nus said in an interview that his comments were reported erroneously. "That was definitely not what was said there," he said.

Dutch Van Nus insisted that he had been asked only where the Weather-

master salespeople met before they moved their offices to Salinas.

In the March 7 interview, Dutch Van Nus described the Fresno meeting as one of the regular meetings of the Weathermaster sales force. He said Fletcher was not introduced as a partner, but only as "Claude Fletcher, who used to work for us."

The chief executive of the Weathermaster Co. in Milpitas and Salinas was Archie Westfall, who became Claude Fletcher's partner. Their firm was separate from the Weathermaster Co. in Fresno, although both Westfall and Fletcher once worked in the Fresno operation.

David Van Nus told the Mercury News in the March 7, 1983, interview that there was "absolutely no doubt" in his mind that Fletcher was involved in the Weathermaster firm before March 1.

He also said then that Weathermaster salespeople had first heard in December about the low-income contract, which was supposed to begin after Jan. 1.

David Van Nus said that since his comments were reported, he had received phone calls from Fletcher and the district attorney's office.

On Thursday, he said that he had been misquoted and that he had not intended his comments to be publicized.

"I just wish I hadn't gotten involved," David Van Nus said.

Tommy Fulcher Jr., the executive director of ESO, said Fletcher contacted him also. Fulcher said Fletcher tried to persuade him to sign a statement that made it appear that Fulcher had warned the Mercury News that his statements about the case were wrong.

In the March 7 interview, Dutch Van Nus, now a Fresno communications executive, said Westfall still owed him money from his work for Weathermaster. He said this week that no one had pressured him to change his story.

"Nobody's leaning on me at all," he said.

District Attorney Leo Himmelsbach, who has reopened an investigation into Fletcher's business dealings, said there was no legal reason that Fletcher shouldn't talk to potential witnesses in the case.

"I don't think there's any question that he can do it and make his own assessment of what was said," Himmelsbach said. "It's a free country. He can talk to whomever he likes."

Three board members who were quoted in the original Mercury News article on the Fletcher case, Joe Melino, Linda Castaldi and Jo Fields, said Fletcher had not contacted them.

San Jose Mercury News 3/10/84 p. 1A

Fletcher had earlier link to company, employees say

By Scott Herhold
Staff Writer

FRESNO — San Jose Councilman Claude Fletcher began attending sales meetings of the Weathermaster insulation company in early January 1983, two months before he resigned from an anti-poverty agency board from which the firm sought a contract, according to two former salesmen for the firm.

The statements of the former salesmen, David and Dutch Van Nus, place Fletcher's involvement with the firm substantially earlier than the 45-year-old councilman has acknowledged.

Fletcher has denied any conflict of interest. In a news conference Thursday, the councilman said he had not attended any Weathermaster meetings before March 1.

Asked about the Van Nuses'

Salesmen link Fletcher to firm in January

Continued from page 1A

he had not attended any Weathermaster meetings before March 1.

Asked about the Van Nuses' statements as he left the conference, Fletcher said, "That's simply not true." He walked away, declining to comment further.

The two Van Nuses, who are brothers, said Fletcher attended a Weathermaster meeting in Fresno shortly after the first of January 1983.

The board of Economic and Social Opportunities Inc. (ESO) did not consider the low-income insulation contract until its Jan. 24, 1983, meeting. But insulation firms throughout the state already were aware that the Public Utilities Commission had approved a program for the free insulation of poor people's homes.

Fletcher has said his financial interest in Weathermaster began only after his resignation from the ESO board on March 9, 1983.

Although acknowledging Thursday that he attended several Weathermaster sales meetings, Fletcher said he went only as a friend of Archie Westfall, a longtime insulation salesman with whom Fletcher had worked 20 years ago in Fresno.

Of the March 1 meeting, which he said was the first he attended, Fletcher said, "Archie Westfall was a friend of mine, and I attended that meeting observing their operation."

But David Van Nus said he had seen Fletcher at "six or seven" sales meetings in San Jose beginning in late January and continuing through early March. Van Nus said he left the firm March 10 because Westfall's promises to give him a management position went unfulfilled.

Van Nus said Fletcher did not speak a great deal at the meetings, which were held on Tuesdays and Thursdays at the Seasons Restaurant on Monterey Road. He said Fletcher missed some Tuesday-night meetings because of his council sessions.

"One time I said something about Claude being a councilman," David Van Nus remembered. "Archie was very hush-hush about it."

"There's absolutely no doubt in my mind that Claude Fletcher was involved in

Weathermaster before March 1."

— David Van Nus, salesman for Weathermaster

David Van Nus said he believed that the reason Fletcher and Westfall formed their partnership was to obtain the $1.6 million insulation contract from ESO for low-income homes.

"There's absolutely no doubt in my mind that Claude Fletcher was involved in Weathermaster before March 1," said David Van Nus, who now sells insulation in Fresno.

He first heard of the low-income project in December, when Westfall told salesmen that the project would begin shortly after the first of the year, Van Nus said.

Westfall could not be reached for comment Friday.

According to Van Nus' brother, Dutch, now an account executive for a Fresno communications firm, the Fresno meeting shortly after the first of the year was one of the regular weekly meetings of the sales staff on the second floor of the Weathermaster-Fresno offices at 86 E. Olive St.

Dutch Van Nus added, however, that nothing was mentioned at that meeting abut Fletcher's becoming a partner.

"He was just introduced as 'Claude Fletcher, who used to work for us,' " he said.

Dutch Van Nus, who worked as a supervising salesman in Weathermaster's Salinas offices, said he did not see Fletcher again until the firm moved into its Milpitas offices in late March.

Ultimately, Weathermaster received only a tiny portion of the ESO work. ESO board members, some of whom said they were angered by Fletcher's lobbying, decided on March 28 to give the contract to a consortium of Hispanic bidders.

The Mercury News reported Sunday that five officials of the agency said Fletcher, while still on the board, had tried to sway the $1.6 million contract to Weathermaster.

Fletcher has denied the allegations, accusing the newspaper of conducting a "political vendetta" against him.

The Weathermaster Co. in Fresno and the Weathermaster Co. in Milpitas, which Fletcher joined as a partner, are separate companies. The link between them is Westfall, who was a manager in the Fresno operation and who became Fletcher's partner in Milpitas. Weathermaster-Milpitas was formally incorporated by Fletcher on April 15, 1983.

ESO's records reflect some confusion between the two companies. On a March 23 application to obtain the ESO contract, Westfall cited the experience and equipment of the Fresno firm as reasons why it should receive the work. The application also used the contractor's license number of the Fresno firm.

But the head of Weathermaster-Fresno, R. Donald Smith, has insisted that Weathermaster-Fresno and Weathermaster-Milpitas were completely separate entities. It was Weathermaster-Milpitas that received authorization for insulating 50 low-income homes through ESO in October.

The recollection of the Van Nuses supports the version of two saleswom en for Weathermaster, who said they attended a March 1 sales meeting at which both Westfall and Fletcher spoke.

Fletcher has collected statements disputing the saleswomen's version that Westfall boasted of Fletcher's being able to obtain the low-income contract.

Both of the Van Nuses said they had never been contacted by the Santa Clara County District Attorney's Office, which has reopened an investigation into Fletcher's conduct.

COURT OF APPEAL OF
THE STATE OF CALIFORNIA

in and for the

SIXTH APPELLATE DISTRICT

CLAUDE FLETCHER,
Plaintiff and Appellant

v.

SAN JOSE MERCURY NEWS, et al.,
Defendants and Respondents

No. H002265

Superior Court
No. 547402

BY THE COURT

Petition for rehearing DENIED.

Dated Nov 27, 1989

CAPACCIOLI,
Acting P.J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Sixth Appellate District No. H002265
SO13384

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

CLAUDE FLETCHER, Appellant

v.

SAN JOSE MERCURY NEWS Et., Respondents

Appellant's petition for review DENIED.

February 1, 1990

KENNARD

Acting Chief Justice

TELEPHONE CONVERSATION BETWEEN TOMMY FULCHER & CLAUDE FLETCHER

Taped 8/27/83 by District Attorney - Without Fletcher's knowledge

"T" - Tom Fulcher "C" - Claude Fletcher

T - Hello, Claude
C - Oh, Hello Tom
T - How you doing?
C - Hey, fine, thanks.
T - Have you been talking to these people from the D.A. lately? They keep coming around to my office asking me a lot of questions and...
C - No, I haven't lately Tom. I thought it was pretty well finished as far as their investigation was concerned. That was what John Pederson told me.
T - Well, he came to my office last, when was it, Wednesday, and asked me a lot of questions. And said that he thought that I wasn't being cooperative and talked about making me go talk to the Grand Jury and stuff
C - Oh boy. Hey Tom, tell them this. I dropped off the board on March 9th, that was my letter of resignation. I did not acquire any ownership in Weathermaster until, I think it was the last day of March, is when I officially, you know, gained some ownership there. So there is no conflict. There couldn't be any.
T - Well they, they asked me like when was the first that, they keep saying when's the first time you talked to me about the Weathermaster thing.
C - Well, we talked about Weathermaster but it wasn't mine, it was Archie's
T - Right, that's what I told them.
C - Yeah, because I didn't know I was going to even get into the business until, like I say, the latter part of March when Archie came to me and offered it to me and I said, "Man, okay I'll do it." Because his other guy, they were having some problems. And Archie says, "Look, why don't you come in and do it with us." And I had already dropped off the board of ESO before that.
T - Yeah, what do you think I oughta do. You think I oughta just not talk to them? Is there any, I mean can they get me in trouble if I don't talk to them?
C - No, no, they can't get you in trouble, Tom. What are

they asking though?
T - Well, they're saying, first they asked when was the first time you ever talked to me. They asked me when you got off the board and I told them it was, I gave them a copy of the board minutes, as a matter of fact, from that meeting. And they said, "Well, when did he start talking to you about Weathermaster.? And I told them I think it was somewhere in February or January. And then they asked me...Oh, did I know this guy, Archie Westfall, and I told them, Yeah. And they said when did you meet him? And I told them, "I think it was in January or February somewhere." And just all kinds of questions they've been asking me.
C - Yeah, Well, I don't see where there's any, I don't, I don't see where any possible conflict at all is there because of the timing on the thing. You know, Archie first came in, we were looking for, you know, when, if you recall, when we first went to the board with this. I urged this board to let you do it, you know, do it within the house.
T - Right.
C - And fought pretty hard for that as I recall. You know, you and I were very strong on that initially.
T - Right
C - And you had asked me if I'd be helpful because you knew I had some background in insulation. And I said, "Sure I'll be helpful." And so then when I found out that Archie was working in this area with Weathermaster, of course, that's when I told him, "Hey, why don't you come in and give us a bid." Because I knew their capabilities. And so he did that and, you know, he came and started talking about that. That's when we started talking with him, Tom. That would have been in, February, you're right.
T - Do they know, do they know about that contract that. They asked me had I ever signed anything with you and I thought they might know something about that contract. That...
C - What contract is that?
T - The one that, that I had gotten from you that I wouldn't sign. The, that I got from you in your office. Just that three, that two or three page thing. Remember when we were talking about that and I said I had to take it back to the board first. Its when they were organizing

the bid process.
C - I don't remember it offhand, Tom.
T - Ah, weil let me see. It was somewhere aroung January, well, if they don't know, if you don't remember, I know they don't know about it.
C - No, I don't remember it offhand. I'd have to, you know, its been a long time.
T - Okay
C - No, I don't remember that at all.
T - Well, I tell you, I guess I just won't talk to them people anymore.
C - Well, just tell them, say, "Hey, I don't know what you're after. Tell me what you want and I'll, you know." I don't mind, you know, I don't have any problem with anything that would be told to them Tom.
T - Okay
C - Because I think everything was pretty much above board and clear cut.
T - Right
C - You know, Archie came in after the board refused to do as we tried to get them to do it. Then we started, you know, we then had to find a contractor. And it was somewhere around, about that time that I knew these guys were working in this area. And I told them, "Hey, come in and put in a bid."
T - Yeah
C - And, and so they did that, of course. And even before that happened, I believe I had dropped off the board though. I believe, even before it came down to those bids coming in.
T - Yeah, I think you got off the board February or March sometime.
C - Well, it was March 9th.
T - Yeah, some, beginning of March.
C - But how, see, the question in my mind is, How could they come up with a conflict there, at all? It just...
T - I don't know.
C - It just seems...
T - But they're digging. Cause they've, I thought it was all over with and then they start, come talking to me again. They said they've, they keep asking if I'm telling them everything that I know. And I keep saying, Yeah. And they say, "Well, we're gonna make sure that you are. We're gonna make you come to the Grand Jury."

And I said, Oh crap! you know, after a whole year of this shit, you know.
C - I wonder what's motivating them, is my question. Because they've gotten, see when I went and saw Pederson. He had already gotten copies of our articles of incorporation. He'd gotten everything.
T - Yeah, he probably got that from me.
C - Oh, is that right? No, not from you. You wouldn't have had that.
T - Oh, you mean your articles of incorporation.
C - Yes, uh uh
T - Oh, okay. Yeah, I thought you were talking about ESO's.
C - You see we didn't even incorporate until April 15th. And we had, you know, Archie and I had agreed, like I say, the last day of March. And thats when I put, I mentioned to you I'd put $40,000 into it.
T - Uh huh
C - Well, thats when I put my $40,000 in as my part of it.
T - Uh huh
C - And that was the way, you know, thats a month after I'm off the board. So I don't see how there can be any possible conflict. So, you know, I don't, I just don't know what they're digging for, or why they're motivated to do this really.
T - Well, I don't know. The, you know, the Hispanic contractors have kind of flopped on this thing. Which, you know, you knew they would.
C - Sure
T - And we brought some more in.
C - Uh huh, what are they doing?
T - They're doing pretty good. But we don't have anywhere near the number done yet, but they...
C - I was going to ask you if you're on target at all.
T - Nah, we're about half.
C - See, I'm waiting, I thought the reason you were calling me was to tell me you needed us.

T - Yeah, I'd have to get that by that board, I, somebody on the board doesn't want to use you.
C - I've gotta figure that out too. As soon as this thing is over, I've got to get on that and hit it pretty hard. Of course, as soon as I find out how this happened and what

caused it. Its gotta be a board member Tom.
T - Yeah
C - And I've gotta find out who
T - Yeah
C - And once we finish this thing up. We'll show that they're being a bunch of asses, you know, whoever tried this thing. Show that they're a bunch of ass, or an ass. And if, then I think the balance of the board will probably say, let, us, use us as part of it.
T - Yeah
C - But, Tom, really its that clear-cut, I think. Ah, you know, Archie, because the board wouldn't let you do it, as I urged, and remember I did fight for you on that board many. Well, you can listen to the minutes of that, or listen to the tape of that board meeting, I think, and you'll find that I was very adamant that ESO ought to do it because I knew the profit that was there.
T - Yeah
C - And so then following that, we decided that we had to get the outside contractors. Thats when, at that point in time, like I say, when Westfall and, Smith was still with him at that time, when Weathermaster came in. And I urged them to get a bid in, you know, to come and get into the picture because I knew their capabilities.
T - Uh huh
C - And they agreed they had an interest. So then, of course, subsequent to that Archie and Don Smith had their falling out. And...
T - Who, who was Don Smith?
C - He was the other owner at Weathermaster.
T - Oh
C - So, if effect, I moved in and, I didn't buy him out directly but, in effect, I replaced Don Smith in Weathermaster the first of April.
T - Uh huh
C - And then we gave him back. We took everything, we took all the Weathermaster offices, Salinas, Milpitas and Fresno. Then, I think it was two months after that. I realized that we couldn't make the whole system work as effectively as I thought we could. So we gave Smith Fresno back and now he's running Fresno. Which, there's very little being done over there, but it relieved me of the headaches administratively of running it.
T - Well, sheesh

C - But, see from that I don't see how they come up with a conflict, or even a potential one. Its gotta be politically motivated is all that I can think of.
T - Well, I don't know why they keep asking me. But, you know, I didn't know if they, if they're talking to you or who. And I didn't know what, you know, I don't want to, I didn't know if I'd tell them something and then they'd go back and say well you didn't tell us the truth and I'd wind up in trouble when I'm...
C - Well, now they've only talked to me, Tom, I went the one time and talked to Pederson. Pederson called me the following week and said that he had completed his investigation. And I said, "Well, do I have any, you know, is there any problem at all?" He said, "I don't think you have a problem at all." Subsequent to that I called this guy Davies. And I said, "Hey, I want to get this thing over with." Because I wanted to come in and try to get part of your contract. You had told me that you were going to open it up to some more contractors.
T - Right
C - And I wanted to come and say, "Hey, I want part of that." So I urged them to get it finished. Well, they didn't, of course, obviously. And I haven't heard, I haven't talked to anybody since then. Now Davies told me he might want to talk to me. I said, "Man, here's my home phone number, here is every phone number I've got. Call me, I'll come in talk to you anytime. I want to get it over with." And I haven't heard from them.
T - Well, I hadn't heard from them in several months until, I guess the last time I talked to you was about two or three months ago.
C - Yeah
T - And I hadn't heard then and then last week when they started calling me again. And I thought the thing was starting up again and I just wanted to know, heh heh.....
C - Well, what they're probably..
T - ...I didn't want to get put in the trick on this thing.
C - Well, I appreciate your, your thoughtfulness on it. What they're probably trying to do, they're probably trying to just get their report finished and over with because they were in Fresno two weeks ago, I think it was. And the guy that went over there was an ass, I guess. Don Smith called me and said, of course, I imagine, and I

hadn't thought about it before that. But I imagine they think that because Don Smith is running that office, that that is still a part of us somehow. And, of course, they don't know the break time in there. You know, the fact that we took it over for a couple of months and then gave it back to him. But anyway, the guy that went to see him was very abusive, verbally. And he told me, he said, "Claude, if I were a younger man I'd have kicked his butt out of here physically." The guy was really that way, I guess. Now Smith is a calm, easy going guy. And, you know, for him to make that comment was pretty strong.
T - Hmmm
C - So its got to be politically motivated.
T - Well, then I guess its gonna come out pretty clean then. Cause I haven't seen that much.
C - Uh huh. Tom, there is no conflict there. And I told Davies that. I said, "Davies I", its David Davies, I think thats it. "Dave, I've looked at this thing and there is no way there could be a conflict. Because I was off the board almost a month before I acquired any interest at all in Weathermaster." And that's a fact, you know, the documents prove that.
T - Uh huh
C - But they, they have a hard time believing most likely that. Of course, they don't know my relationship with Archie Westfall from 25 years ago. They don't realize that it just kind of developed momentarily. You know, Archie came to me and said, "Hey, its falling apart with Don Smith will you come in with me?" And I said, Sure.
T - Okay. Would, I just wondered if they ever ask, asked you anything bout me?
C - Never mentioned you.
T - Okay
C - No. They have never mentioned Tom Fulcher to me at all.
T - Okay
C - You know, I think the basic facts as they are, are adequate.
T - Okay
C - I don't think we have to embellish them just, you know, tell them exactly that and leave it. Because there is no conflict. I'm absolutely confident of that.

T - Okay
C - Hey, appreciate you giving me a buzz and I'll let you know if I hear anything.
T - Okay, Claude.
C - Okay. Thanks Tom.
T - Thank you. Bye bye
END.....

Supreme Court, U.S.
FILED
JUN 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1788

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1989

Claude Fletcher,

Petitioner,

vs.

San Jose Mercury News,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeal correctly conclude that the evidence in this case was insufficient to show with convincing clarity that respondent newspaper acted with actual knowledge of falsity or a high degree of awareness of probable falsity?[1]

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[1] Respondent San Jose Mercury News is a wholly owned subsidiary of Knight-Ridder Publishing, Inc.

TABLE OF AUTHORITIES

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Cases

Harte-Hanks Communication Inc. v. Connaughton, ___ U.S. ___, 109 S.Ct. 2678 (1989) 11-14, 17

No. 89-1788

IN THE SUPREME COURT

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UNITED STATES

October Term, 1989

Claude Fletcher,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner's statement of the case contains many assertions contrary to, or not supported by, the record. The pertinent facts are analyzed in detail in the opinion of the California Court of Appeal. In the proceedings below, petitioner conceded that

the statement of facts in that opinion was "largely correct" (Petition for Review by California Supreme Court, p. 3). In his petition to this Court, however, petitioner has identified for the first time "several" supposed factual errors in that opinion (see Pet., pp. 13-18). These newly raised claims are without merit. We limit our discussion to some of the more important facts and to a refutation of petitioner's misstatements of the facts:

In January 1984, Phil Trounstine, an editorial writer for respondent San Jose Mercury News (hereinafter sometimes the "News") received a tip from two confidential sources that there had been an investigation by the local District Attorney into an alleged bribe attempt involving petitioner and Tommy Fulcher, the executive director of Economic and Social Opportunities, Inc. ("ESO"), a local anti-poverty agency (RT,

pp. 1189, 1206). At that time, petitioner was a city councilman and a member of the board of directors of ESO (RT, pp. 947, 1185-1186). It was reported to Trounstine that petitioner had attempted to obtain an ESO contract for a company called Weathermaster, and that petitioner allegedly had a financial interest in Weathermaster prior to his March 9, 1983 resignation from the ESO board (RT, pp. 1184-1186, 2078-2080).[2]

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[2] Petitioner erroneously asserts that the News had received this information six months earlier but delayed investigation until petitioner stood for election for Mayor (see Pet., pp. 6, 25, 27). In fact, Mr. Trounstine had previously received a different report of an alleged conflict of interest involving petitioner and Weathermaster, but had been unable to corroborate it (RT, pp. 1188, 1204-1206). The District Attorney's investigation followed and prompted the News' investigation and story in issue here.

With respect to the first report to Trounstine, petitioner asserts that the Court of Appeal erred in noting that one of the alleged sources of information declined to speak to Trounstine (Pet., p. 13). In fact, the opinion below correctly states the record (see RT 7, p. 1212), and the

Trounstine turned this information over to News' reporter Scott Herhold for investigation (RT, pp. 1189-1190, 1206-1208, 1932). Herhold immediately commenced an investigation. He telephoned ESO executive director Fulcher, who told Herhold that a proposal for ESO to sponsor a project to weatherize the homes of low-income persons had first come before the ESO board in January 1983 (RT, pp. 1538-1550, 1971). At that meeting, petitioner volunteered to investigate the possibility of having outside contractors perform the work for ESO (RT, pp. 1091, 1511-1512, 1543-1544). Thereafter, on several occasions, petitioner urged that Weathermaster be awarded the contract (RT 6, pp. 1542, 1971-1972).[3]

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same statement is also found in petitioner's opening brief in the Court of Appeal (at p. 10, lines 12-15).

[3] Ultimately, as the Court of Appeal noted (Appx. to Pet., p. 8a), the bulk of the ESO contract was awarded to a different

Fulcher reported that, in a conversation in February 1983, petitioner had asked whether Fulcher and his wife would like a trip to Hawaii, a comment Fulcher interpreted as an offer of a bribe (RT 6, pp. 1521-1522, 1541, 1547, 1974-1976). In another conversation, petitioner had told Fulcher "there is something in this for you" (RT, pp. 1523, 1545, 1974-1976), a comment Fulcher also interpreted as an offer of a bribe (RT, pp. 1544-1545, 1687-1688, 1695-1696). Fulcher also told Herhold that, at another time in February 1983, petitioner had told him that petitioner was "out on a limb" because he had invested $40,000 in Weathermaster (RT 6, pp. 1546, 1643, 1975).

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company. Petitioner erroneously asserts that the Court of Appeal was "plainly wrong" in stating that Weathermaster received a small portion of the work (Pet., p. 13). In fact, the Court of Appeal was correct (RT, p. 625).

Fulcher told Herhold that he had been shocked and outraged by petitioner's actions, and that he eventually reported those apparent attempts at bribery and the possible conflict of interest to the District Attorney (RT 6, pp. 1549, 1992).

During February and early March 1984, reporter Herhold corroborated Fulcher's story by contacting various members of the ESO board of directors (RT, pp. 933-934, 937-939, 942, 1698-1699, 1701-1702, 1814-1819, 1982-1986, 1991, 2076-2079). All of the ESO board members to whom Herhold spoke told him that petitioner had urged that the contract be awarded to Weathermaster (ibid.).[4]

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[4] Petitioner erroneously asserts that the News falsely reported the ESO board members' comments and, in particular, that the ESO board members assertedly denied that they had said that petitioner had "lobbied" them on behalf of Weathermaster (see Pet., pp. 14-15). In fact, at trial, all but one of the board members interviewed by Herhold acknowledged that they told him that they had been "lobbied" by petitioner on Weathermaster's behalf (RT,

Having obtained ESO director Fulcher's story and the corroborating information from the ESO board members, reporter Herhold conducted further investigation of background information. In the course of that investigation, he interviewed other witnesses who reported that petitioner had ties to Weathermaster prior to his resignation from the ESO board (RT, pp. 1722-1725, 1728-1734, 1771-1772, 1872-1873, 2006, 2017-2019, 2033-2034, 2060-2061, 2063, 2065-2066).[5]

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pp. 1699, 1817, 2079, 2339, 2344). The other board member denied use of the word "lobby," but acknowledged that petitioner had recommended Weathermaster to her (RT, p. 934).

[5] Petitioner makes a great deal of the fact that, at trial, certain (but not all) of those individuals denied that they had made statements attributed to them (see Pet., pp. 8-11, 23, 27). However, petitioner ignores several critical facts. First, the main thrust of the news articles (about petitioner's alleged conflict of interest and the apparent bribe attempts) was received from ESO executive director Fulcher and ESO board members who affirmed

Before publishing the articles, the News contacted petitioner. In a tape recorded interview, petitioner stated that he obtained a financial interest in Weathermaster after his resignation from the ESO board (Tape Transcript ("Tr."), pp. 6, 23). Petitioner denied that he had offered Mr. Fulcher a trip to Hawaii or said "there is something in this for you" (Tr., pp. 49-52).[6] He further denied that he had recommended Weathermaster to the ESO board

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at trial that they were accurately quoted by the News. Second, the witnesses mentioned by petitioner provided only peripheral background information. Third, although some of those witnesses denied certain specific details, they confirmed that they had in fact given reporter Herhold information that tied plaintiff to Weathermaster prior to his resignation from the ESO board (RT 433, 439-441, 461, 838-841, 861-863, 2250). Fourth, two of those witnesses admitted at trial that they had previously acknowledged the accuracy of the News' reports (RT 456-457, 2258-2268).

[6] At trial, petitioner admitted that he had made the comments in question, but he argued that they had been misinterpreted (see RT, pp. 996-997, 1104).

(Tr., pp. 25-26, 50).[7] While asserting that the proposed Weathermaster contract with ESO was not a factor in his ultimate investment in Weathermaster, he admitted:

> "I saw a chance to move into that field and I took that opportunity, yes, and granted, it did come about because of that investigation on behalf of the public agency, sure it did * * *" (Tr., p. 84; Appx. to Pet., p. 18a).

After the interview, petitioner urged Mr. Fulcher to tell the News that petitioner's comments to Fulcher about a trip to Hawaii and "something in this for you" (which petitioner had flatly denied making at all in his interview with the News) could have been interpreted in different ways (RT, pp. 1111, 1551-1552). Mr. Fulcher did so, but at the

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[7] At trial, petitioner admitted that he had in fact recommended Weathermaster to ESO board members in early February 1983 (RT 4, pp. 904-905, 1115-1120).

same time he affirmed that he had interpreted petitioner's approach to him as a bribe offer because "there was no other way I could interpret it" (RT, pp. 1552-1553, 1592-1593, 1916-1917, 1926-1928).

The articles in issue (see Pet., pp. 22A-36A) followed.

ARGUMENT

I. THE PETITION PRESENTS NO IMPORTANT ISSUE FOR REVIEW.

A. This Court Has Clearly Held That the Constitutional Actual Malice Standard Applies in Libel Actions Brought by Public Figures.

The sole legal issue offered for review by the petition is:

"Whether highly unreasonable conduct constituting an extreme departure from ordinary standards of investigation and reporting is alone enough to establish the malice necessary to assess liability in a public-figure libel case" (Pet., p. i).

In posing this issue, petitioner ignores this Court's recent opinion in Harte-Hanks Communication Inc. v. Connaughton, ___ U.S. ___, 109 S.Ct. 2678 (1989). As that decision notes, it had once been suggested that the test proposed by petitioner be applicable in public figure cases. However, that proposed test "was emphatically rejected by a majority of the Court" (109 S.Ct. 2685). As this Court concluded,

"Today, there is no question that public figure libel cases are controlled by the New York Times standard and not by the professional standards rule

which never commanded a majority of this Court" (ibid.).

Accordingly, whether petitioner is deemed a public official or a public figure, the constitutional actual malice test unquestionably applies.

B. The Other Issues Presented by the Petition Are Based Upon Petitioner's Misstatements of the Facts.

The petition also presents two other purported "issues" for review (see Pet., p. i, issues (2) and (3)), both of which fact-bound issues are dependent upon petitioner's erroneous statements of the evidence. For example, petitioner makes repeated references to supposed evidence of fabrications by the reporter, and he argues that a finding of constitutional actual malice could be based upon such evidence

(Pet., pp. 8-11, 13, 14-16, 20, 26). However, as discussed above (p. 6, n. 4; p. 7, n. 5), there is no substantial evidence, let alone clear and convincing evidence, of fabrication. Petitioner fails to disclose that the witnesses upon whom he relies either admitted that the reporter had correctly reported the substance of their comments (as opposed to the precise words spoken) or that those witnesses were so substantially impeached that their testimony could not possibly have constituted clear and convincing evidence of anything.

Thus, the contrast between the facts in this Court's decision in Harte-Hanks and the exhaustive, two-month investigation in the instant case is striking. The primary source for the news stories here, ESO executive director Tommy Fulcher, was a reliable source who told a plausible story which, to the extent it could be checked, had been

corroborated by every source inside ESO contacted by the newspaper.[8] Moreover, rather than relying solely on Fulcher's information and that of other ESO personnel, the newspaper continued to investigate every possible source of information about petitioner's dealings with ESO. Several of those sources provided corroborating information, and none of them provided contrary information. Unlike Harte-Hanks, there is no evidence of a deliberate choice to avoid the truth.[9]

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[8] In arguments not raised below, petitioner attempts to impeach the credibility of ESO executive director Fulcher (see Pet., pp. 15, 26). None of the matter belatedly raised by petitioner bears on Fulcher's credibility in general or with respect to the reports in issue here.

[9] In a strained attempt to draw an analogy to Harte-Hanks, petitioner asserts that the News "decided not to listen" to a tape recording of a special ESO board meeting in February 1983 (Pet., pp. 23-24, 26). In fact, at the time of the investigation, the reporter was unaware that the special meeting had occurred (RT, pp. 2218-2219). Moreover, nothing in the tape in

C. Petitioner's Claims of Errors of State Law Are Without Merit.

Petitioner complains that the California Court of Appeal did not correctly state California law governing grants of judgments notwithstanding the verdict (see Pet., pp. 19-20). Even if that were true, it would hardly present a question of concern to this Court. Moreover, the very statements by the trial court and by the Court of Appeal quoted in the petition (at pp. 19-20) show that those courts were fully aware of the respective roles of judge and jury. Consistent with its obligation under federal constitutional law, the Court of Appeal correctly reviewed all the evidence on the issue of constitutional actual malice, and it

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issue would have revealed any errors in the News' story. Indeed, on that tape, two board members state that petitioner had urged them to award the contract to Weathermaster (RT, pp. 1114-1115).

correctly concluded that there was no clear and convincing evidence that the News was aware that its reports were actually or probably false (see also discussion, infra, pp. 17-19).

Petitioner also complains of purported "unusual" actions by the trial court (see Pet., pp. 12-13). These belated claims of trial court error do not involve any question of federal law and certainly no question worthy of this Court's attention. Moreover, none of those actions were even questioned as error before either the California Court of Appeal or the California Supreme Court.

II. THE DECISION BELOW IS IN ACCORD WITH THE DECISIONS OF THIS COURT, INCLUDING ITS RECENT DECISION IN HARTE-HANKS COMMUNICATIONS INC. v. CONNAUGHTON.

Petitioner argues that the decision below departs from this Court's rulings in that the evidence, assertedly, would support a finding of constitutional actual malice. Petitioner is wrong.

Petitioner places great reliance on his demand for retraction, asserting that "this alone is sufficient to present a jury question on the issue of constitutional malice" (Pet., p. 20). Precisely the same argument was emphatically rejected by this Court in Harte-Hanks (___ U.S. ___, 109 S.Ct. 2698, n. 37).

Petitioners' remaining arguments (see Pet., pp. 22-25) are based upon his numerous erroneous statements of the record. Each of those arguments was reviewed and correctly rejected by the Court of Appeal (see App. to Pet., pp. 14a-17a). Contrary to petitioner's assertion (Pet., p. 18), the Court of Appeal recognized its obligation to review all the evidence of actual malice (Appx. to Pet., p. 14a), and its exhaustive review of the facts demonstrates that it did so (see id., pp. 7a-11a).

There is no need to repeat that review here. Suffice it to say that the uncontradicted evidence shows that the articles were based upon reports from a reliable source and that those reports were corroborated by several independent witnesses. There is no evidence, and certainly no clear and convincing evidence, that either the newspaper or its reporter was aware of

any errors in the articles or that they doubted the articles' accuracy. The courts below were therefore correct in determining that judgment should be entered on behalf of the defendant newspaper.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 89-1788

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Claude C. Fletcher
Petitioner,

v.

San Jose Mercury News, Inc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
CALIFORNIA COURT OF APPEALS,
SIXTH DISTRICT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Petitioner Claude C. Fletcher ("Fletcher") respectfully submits this reply brief in response to the Brief of the San Jose Mercury News ("News") in opposition to Fletcher's petition for a writ of certiorari.

Respondent's Brief In Opposition is little more than a clever attempt to cast doubt on petitioner's facts. In its attempt to accomplish this, News takes great liberties with the facts of this case. Many of their assertions are totally without foundation and do not contain accurate references to the record. Rather than rebut every incorrect statement, petitioner will only discuss a few of the more important issues.

The Brief In Opposition uses references to respondent's transcript of the Fletcher/Mercury News interview. The tape recording of that interview shows that many of the "references" in their brief are inaccurate and do not correctly reflect that interview. Even the trial court judge refused to accept their transcript because of the many substantive errors it contained.

Also, throughout the brief, respondent makes a number of false statements regarding ESO board members and the record clearly contradicts their contentions.

Respondent apparently takes a calculated gamble that this Court will not grant the writ and they will not be held accountable for their mistatements of fact and inaccurate references to the record.

REPLY TO RESPONDENT'S ARGUMENT IN OPPOSITION TO REASONS FOR GRANTING THE WRIT

I. STATEMENT OF THE CASE

1. News disputes Fletcher's statement that its investigation was delayed for six months until he stood for re-election and asserts the Joe Melino report was different from the investigation that prompted the News' investigation and story in issue here (res., p. 3).

Reporter Scott Herhold's testimony shows that Joe Melino was the source of Trounstine's information:

Q. Did he (Trounstine) tell you where he got the info? *A. No. But he did suggest I should talk to Joe Melino.* Q. Would you say this was your first contact, in any stretch of the word, with the Fletcher situation? *A. Yes.* Q. Did you ask Mr. Trounstine any questions? You've told us what you recall him saying to you. Did you say anything to him? *A. I can't recall what I said.* Q. After you and Mr. Trounstine finished your conversation, was the next step to go speak with Mr. Melino? *A. Yes.* Q. You

did not, for example, go and review any documents or talk to anyone else before going to Mr. Melino? *A. No.* Q. Did Mr. Trounstine ever tell you where he got his information that he imparted to you? *A. As I say, he told me that I ought to talk to Mr. Melino, so I assume Mr. Melino was one of his sources.* (Scott Herhold deposition Volume I, November 12, 1984, page 69).

2. News also disputes Fletcher's statement that the Court of Appeal erred in noting that one of the alleged sources of information declined to speak to Trounstine (res., p. 3).

The record shows differently: Q. Did you (Joe Melino) recall Mr. Trounstine asking you to call Paul Goda and ask him if he would be willing to go on the record with respect to some of this information? *A. That could be, sir, but I don't recall that specifically at this point* (8 RT 2080:12-16).

Of course, Mercury News employee, Phil Trounstine, testified that Melino told him Father Goda was not willing to talk (5 RT 1212). The jury obviously made a credibility determination on Mr. Trounstine.

It should be noted, Father Paul Goda, University of Santa Clara law professor, did not testify in agree-

ment with Mr. Trounstine's version of events, but he did testify that reporter Herhold was trying to "put words in his mouth against Fletcher and was on somewhat of a crusade against Fletcher" (3 RT 822).

3. Respondent references RT, p. 625 in disagreeing with petitioner's statement that the Appellate Court was "plainly wrong" in stating that Weathermaster received a small portion of the ESO contract being discussed in January - March 1983 (res., p. 5). That reference states: Q. ...Was that contract awarded by the same ESO agency that you had been bidding to in March of 1983? *A. Yes, sir* (3 RT 625, emphasis added). This was a discussion about a few units that had been done by Weathermaster at Tommy Fulcher's specific request in October of 1983, some seven months after the ESO low-income weatherization contract had been given, in its entirety, to other contractors. It was not the same contract that was bid in March 1983 as alleged by the Mercury News.

4. Respondent states "...he interviewed other witnesses who reported that petitioner had ties to Weathermaster prior to his resignation from the ESO board" (res., p. 7). Following this statement, respondent lists ten references to the record. Seven of those references have absolutely no relationship to the subject

matter. The remaining three are, at best, only tangential to the subject and were statements by the reporter.

As it did throughout this brief, respondent has tried to give "authority" to statements by listing erroneous references to the record.

5. Respondent states that "Fletcher denied he had recommended Weathermaster to the ESO board" (res., p. 8). News then references its transcript of the Fletcher/Mercury news interview. News tried to leave this same erroneous impression at trial and was proven wrong (4 RT 1154-1155). The tape recording was played for the jury, (8 RT 2112-2118), and it does not include any such statement by Fletcher. Fletcher has never disagreed with the fact that he recommended Weathermaster to ESO. News had portrayed that as "lobbying hard in an attempt to secure a contract for personal gain." Fletcher denied that and since both the jury and the judge found the articles to be false, we must assume this denial was believed by the triers of fact.

6. ...they confirmed that they had in fact given reporter Herhold information that tied plaintiff to Weathermaster prior to his resignation from the ESO board (res., p. 8).

This is a blatant distortion of the facts. The refer-

ences listed by respondent simply do not support that statement.

7. Respondent quotes Fletcher: "I saw a chance to move into that field and I took that opportunity, yes and granted, it did come about because of that investigation on behalf of the public agency, sure it did." (res., p. 9).

Respondent again uses a measure of deception. The tape recording shows this is one sentence taken out of a long discussion by Fletcher. It does not give the context of that statement and leaves an impression that is almost exactly opposite the discussion.

II. THE PETITION PRESENTS IMPORTANT ISSUES FOR REVIEW

1. The most important issues presented by petitioner relate to just how far a reporter can go in changing or originating supposed statements of news sources. Also, whether the Appellate Court's opinion, which apparently allows reporters to originate multiple fabricated statements with impunity, establishes the kind of precedent that accurately reflects this Court's approach to libel judgments regarding public officials. It is those questions that merit the grant of the Writ.

Even if respondent is correct that this Court recent-

ly addressed the first issue presented for review by petitioner (res. pp. 11,12), the remaining questions present even more important issues that must be addressed by this Court.

2. Respondent alleges: "Petitioner fails to disclose that the witnesses upon whom he relies either admitted that the reporter had correctly reported the substance of their comments ...or that those witnesses were so substantially impeached that their testimony could not possibly have constituted clear and convincing evidence of anything" (Res., p. 13).

That assertion is incomprehensible. The first statement is totally without foundation and has no reference to the record. The second statement can be dismissed by pointing out that the jury did make credibility determinations and they obviously did not agree with respondent. That also applies to many other statements presented by respondent throughout its brief.

3. Respondent states that "The primary source for the news stories here, ESO executive director Tommy Fulcher, was a reliable source who told a plausible story..." (res., p.13).

That is obviously not true based on information the

reporter had available to him (pet., pp. 15-17). Also, the telephone conversation secretly taped by the District Attorney impacted Fulcher's credibility (app., pp. 39a-46a). The jury had reason to believe Herhold was fully informed of the District Attorney's evidence due to Herhold's off-the-record source in the District Attorney's office (8 RT 2201-2203).

Fulcher's credibility was further eroded when he produced an ESO document with a missing torn-off corner which contained the date of the document (9RT 2381-2382). The same document, with the corner intact, was later introduced and showed that Fulcher's allegations about Claude Fletcher could not have occurred as stated by Fulcher (9 RT 2392). It should be noted, the intact document was available to News during its initial investigation of this story. It seemed apparent to the jury that Fulcher had torn off the document's date in an attempt to protect his story. Thus, had the lower court conducted a de novo review, it could not have agreed with the trial judge on Fulcher's credibility.

4. Respondent attempts to reject petitioners observation that the Mercury News deliberately did not listen to tapes of the February 1983 ESO board meet

ings. "...at the time of the investigation, the reporter was unaware that the special meeting had occurred" (Res., p. 14).

Testimony by Scott Herhold shows that to be incorrect: Q. Prior to the publication of your March 4 story, did you hear any tape recordings of ESO board meetings? *A. Yes.* Q. Which ones? *A. I know I listened to the January and to the March meetings. And I'm not certain about the--about February.* Q. Which March meeting? *A. The March 28th meeting.* Q. Any others? *A. Well, the January meeting.* Q. Just one meeting in January? *A. Yes.* Q. How about February? *A. I think I got--I asked for the tapes of all three, and there seemed to be relatively little in February, and so I don't have a clear recollection of having listened to that, the February tape.* Q. But you do have a clear recollection of asking for all of the tapes for January, February, and March? *A. I think so, yes.* Q. And to the best of your knowledge, whatever you asked for, they did provide to you? *A. I think so, yes.* (Scott Herhold deposition Volume II, November 20, 1984, pages 216, 217).

Q. I may have asked you this way back when, but how many different ESO board meeting tapes did

you listen to? *A. I know I listened to the January and to the March tapes, and I think I may have briefly listened to part of the February tape, but I don't have a real good recollection of that.* Q. Are you indicating one in January and one in March? *A. Correct.* Q. And how about February, what are you indicating? *A. I believe I listened to it very quickly, but I couldn't find anything immediately that I thought was relevant, so I didn't go through it in detail.*

(Scott Herhold deposition Volume IV, January 31, 1985, page 378).

Obviously, the reporter had in his posession and probably listened to the February ESO board meeting tapes that proved Fulcher's statements were not accurate, therefore, the jury had every right to assume he deliberately chose to avoid the truth. Harte-Hanks v. Connaughton 109 S. Ct. 2693 (1989). "Although failure to investigate will not alone support a finding of actual malice, *** the purposeful avoidance of the truth is in a different category" (id., 109 S. Ct. at 2698).

III. THE DECISION BELOW IS NOT IN ACCORD WITH DECISIONS OF THIS COURT

1. Respondent argues that the lower court decision is in accord with this Court and that it recognized

its obligation to review all the evidence of actual malice and its exhaustive review of the facts demonstrates that it did so (res., p 18).

With reference to the lower court decision, it is respectfully submitted that they had little time to review much more than the trial court opinion. Material presented by petitioner shows that to be the case (pet., pp. 13-26). The lower court opinion is clearly not in accord with this Court's opinion in Harte-Hanks Communications v. Connaughton.

2. Additionally, the lower court specifically addressed the issue of slander as presented by petitioner (pet., 15a) and came to a conclusion that is directly contrary to this Court's recent opinion in Michael Milkovich, Sr. vs. Lorain Journal Co. 497 U.S. Reports.

Petitioner originally filed both a libel and slander cause of action. Following the close of petitioner's case-in-chief, the trial court granted nonsuit of the slander cause of action (pet., p. 3). An appeal was immediately filed and was later consolidated with the libel appeal.

The court found the defamatory statements uttered orally by defendant reporter Scott Herhold, and the court assumed they were proved prima facie, were

constitutionally protected opinions (6 RT 1486-1487:10, CT 429:20-430:22).

In attempting to get a source to agree with him, reporter Herhold stated, "Why won't you help me get Claude Fletcher?" "Claude Fletcher is a crook and a crooked politician and I don't want him to be reelected." (3 RT 649, 650). This was said in an attempt to get damaging statements about petitioner from the hearer.

This Court stated in Milkovich v. Lorain, "The reference to 'opinion' in dictum in Gertz ... was not intended to create a wholesale defamation exemption for 'opinion' ... This decision balances the First Amendment's vital guarantee of free and uninhibited discussion of public issues with the important social values that underlie defamation law and society's pervasive and strong interest in preventing and redressing attacks upon reputation."

A reasonable factfinder could conclude that the statements made by Herhold imply Fletcher had committed some crime and the statements did not use the sort of loose, figurative, or hyperbolic language that would negate the impression that Herhold was seriously maintaining Fletcher committed some crime.

Nor does the statement's general tenor negate this impression. In addition, the connotation that Fletcher committed some crime is sufficiently factual that it is susceptible of being proved true or false Milkovich v. Lorain.

If an accusation is ambiguous, then it is a jury question as to whether the statement is protected opinion or not. Good Government Group, (1978), 22 C.3d at 682. Since the subject statements were not ambiguous, they were defamatory per se, Fisher v. Larsen (1983), 138 C.A.3d 627, and the lower court would have realized that had they conducted a de nova review rather than simply rely on the trial court opinion.

Thus, it is abundantly clear that the lower court opinion differs from this Court on several very important issues in this case.

CONCLUSION

Nothing is more precious than a person's good reputation in a community.

Petitioner suffered an irrevocable loss of reputation in his personal, professional, and political life because of respondent's calculated efforts at removing him from public office.

The First Amendment safe harbor should not

include protection from deliberate lies developed with the intent of forcing a public official from office, no matter how strongly a media entity disagrees with that public official.

The Petition for a Writ of Certiorari contains an accurate description of this case and presents several very substantial questions for this Court to answer.

Accordingly, this Court should grant certiorari to allow the submission of briefs and a complete review of the jury verdict with all the evidence on the table.

Respectfully submitted,

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